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ABSTRACT

This document presents a historical review of the Dartmouth College Case, "Trustees of Dartmouth College vs. William H. Woodward, "February 1819. The case, testing the right of private education to survive, is presented in light of the chronological order of events as well as characterizations of the principal actors. (MJM)

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WILL TO RESIST

The Dartmouth College Case

By RICHARD W. MORIN '24

Librarian of the College, Emeritus

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150 years ago, in February 1819, the United States Supreme Court in the case of "Trustees of Dartmouth College vs. William H. Woodward" rendered one of its landmark decisions. In a new account that concentrates on the College side of the case, Mr. Morin tells the full story of the controversy, from the first campus quarrel to the climax in Washington, where Daniel Webster successfully defended the independence of his alma mater.

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THE Dartmouth College Case belongs to two societies. The first is the Dartmouth College family itself; the second is the larger community of legal scholars and practitioners, and Constitutional historians. The College family tends to view with a mixture of pride and regret this required sharing. The second society — the professional one — regards the members of the first with a kind of amused tolerance. Unmoved by the dramatic rescue of a "small college," the professional society indulges the Dartmouth College family only so long as it does not insist on dealing in misty-eyed irrelevancies in its claim on the Case. It will not long be in doubt which of the two constituencies is the more favored in the following account.

Chartered in 1769 in the name of the British sovereign, George III, Dartmouth, the last of the Colonial colleges, was predesigned to test, fifty years later before the United States Supreme Court, the right of private education to survive. Behind the historic decision in *Trustees of Dartmouth College v. William H. Woodward*, known to lawyers and laymen alike as the Dartmouth College Case, lay years of upheaval and bitterness which cast into balance the very life of the institution. This festering torment, ended only by Chief Justice Marshall's opinion in 1819, took shape in the opening years of the nineteenth century. But it might be said to have had its earliest beginnings in a provision of the charter itself which authorized Eleazar Wheelock, founder and first President of the College, to name his own successor as President. At the time, in view of Eleazar Wheelock's single-handed elevation of the College from a dream to a reality, nothing could have seemed more natural than the granting to him of such a power. In fact, at the moment of the College's birth, and for long thereafter, it was impossible to distinguish between it and Wheelock, so completely did the former depend upon the energy, resourcefulness, and determination of the latter. Though the charter vested the supervision of the College in twelve Trustees of which Wheelock was but one, it was Wheelock who had in fact selected most of the Trustees appointed by the charter, and acquiesced in the remainder. Throughout Eleazar Wheelock's life those Trustees and their successors were content to leave to the founding father the entire control of the institution. His skillful guidance seemed to them evidence of the wisdom of such a course, and when Eleazar Wheelock by his will appointed his son John to succeed him it is probable that none among the Trustees conceived that a day could come when the Board would choose to exercise its charter power to remove John Wheelock from the presidency. On the contrary their dominant concern was to persuade John Wheelock to accept the office, in the face of his own reluctance to do so.

Putting aside his personal preferences, John Wheelock became the second President of Dartmouth College on October 19, 1779 at the age of 25. He was the second son of Eleazar, and actually had been his father's third choice to succeed him. His older brother, Ralph, who was his father's first choice as successor, had become incurably ill. The founder's second choice was his stepson, the Rev. John Maltby, whose death preceded Dr. Wheelock's. There appears to have been no consideration given to a selection outside the family. That a son should inherit the presidency followed naturally upon the founder's custom of looking upon the College as a private family preserve. After all, to whom did the College owe its existence? To George III in theory; to Colonial Governor John Wentworth as the instrument of the sovereign; but to Eleazar Wheelock in fact. On whom rested the authority not only for the day-to-day life of the College but for its fundamental direction and supervision? In theory on the Trustees perhaps; but in practice this responsibility was Eleazar's and his alone. Equally spontaneous was it for John Wheelock, once in office, to view himself as in every way his father's natural successor, in authority as well as title.

For the next 25 years John Wheelock reigned without challenge, dedicated and despotic. The early part of his rule was generally beneficial to the institution, despite his disposition to find too often an identity between his own interests and those of the College. This relatively smooth course might have continued indefinitely had no changes occurred in the makeup of the Board of Trustees. However, as Trustee replacements occurred in the early years of the nineteenth century, serene acceptance by the Board of all presidential acts began to fade, and in the face of opposition, John Wheelock exposed qualities of wilfulness which had not before come harmfully to the surface in his official conduct.

The instrument for polarizing Trustee opposition to John Wheelock was Nathaniel Niles. Elected to the Board as early as 1793, Niles was a Princeton graduate and resident of Fairlee, Vt. Qualified both as a lawyer and as a minister, he remained on the Board until 1820, a lone Republican* among Federalists. At first the Board's only independent voice, he was joined in 1801 by Thomas W. Thompson of Concord, N. H., a Harvard graduate, lawyer, Federalist Member of Congress, and later United States Senator. The next potential dissenter was Timothy Farrar, New Hampshire resident, graduate of Harvard, lawyer, and judge, who became a Trustee in 1804. Following him was Elijah Paine of Williamstown, Vt., elected to the Board in 1806. Like Farrar, Paine was a lawyer-judge; he was, moreover, a former United States Senator. Two

* Based on Jeffersonian principles the Republican Party, as it officially called itself, held control of the Presidency of the United States throughout most of the first half of the nineteenth century. In New Hampshire it was ascendant during the liveliest part of the College controversy. Though its members were known, almost interchangeably, as "Republicans" or "Democrats," only the former term is used here, in the interest of consistency, quotations excepted. By the 1830s the terms "Democratic Party" and "Democrats" had become more common.

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Trustees died between the annual meetings of 1808 and 1809. One was old Professor John Smith, friend, admirer and subservient of both the Wheelocks, Dartmouth teacher since 1774 and Trustee since 1788, and a central factor in the church controversy later described. These two vacancies were filled at the August 1809 annual meeting by the elections of Charles Marsh of Woodstock, Vt., a Dartmouth graduate during John Wheelock's presidency and a lawyer by profession who had declined appointment to the Vermont Supreme Court; and Asa McFarland, also a Dartmouth graduate in the John Wheelock era, a former Dartmouth tutor, and at the time of his election the pastor of the First Congregational Church in Concord, N. H. Thus by 1809 there were already in office six of the eight Trustees later to make up the famous Octagon that stood in defiance of the powers of the State of New Hampshire to precipitate the Dartmouth College Case. Within the Board it was evident by that year that a serious conflict with President John Wheelock would be difficult to avoid.

THE collision between President and Board, though probably inevitable under the abrasive force of John Wheelock's imperious and demanding mien, arose directly out of the church controversy. This long, complex, and today almost incomprehensible struggle began in 1804 with the desire of a majority of the members of the local church to drop Professor Smith, who had long served as its pastor, in favor of the new Professor of Theology at the College, Roswell Shurtleff. President Wheelock was unwilling to see his personal control over the church thus weakened, a control made possible by the subservience of Professor Smith, its pastor. The disagreement heated into a quarrel which lasted for ten years during which John Wheelock called into play his extraordinary capacity for artfulness and dissimulation. His efforts to enlist the power of the Board on his side in the controversy partially succeeded in the early years when its majority was still supine. Wheelock's determination to rule or ruin (he was called "Samson" behind his back by foes and friends alike) split the church into two contesting fragments. As his hold over the whole weakened, he increased his efforts to enlist the official voice of the Trustees in support of his ends. Worried by the suspicion that they were being asked to act beyond their jurisdiction, the Trustees sought to be peacemakers. As is common to this role, they were reviled by both sides. The lack of success attending their halfhearted and informal endeavors increased their disposition to resist being drawn by the President into direct battle. When in 1811 Wheelock charged his Board with misappropriating the Phillips Fund (which supported the professorship of divinity) by permitting Professor Shurtleff to devote part of his time to preaching to that branch of the local church to which Wheelock was opposed, the Trustees by a vote of seven to three rejected the President's contention and for the first time took a formal stance in opposition to him. The same seven Trustees likewise noted that they had "long labored to restore the harmony which formerly prevailed in this Institution without success and it is with reluctance they express their apprehension that if the present state of things is suffered to remain any great length of time the College will be essentially injured."

At the same meeting the seven rebellious Trustees called into question the President's authority to determine by himself instances of delinquency among the students, and by the same split vote that authority was declared to rest not in the President alone but in a majority of the "Executive Officers" of whom the President was only one, and the faculty the balance.

Other blows to the President occurred. In addition to the death of the pliable Professor Smith, he lost by the same cause a second supporter on the faculty. Their replacements, Professor Ebenezer Adams and Rev. Zephaniah Swift Moore, threatened his hegemony within the institution. Moore had been chosen by the Trustees contrary to Wheelock's express desire that the appointment be accorded to his sycophantic friend, the Rev. Elijah Parish. The wisdom of the Trustees was demonstrated when Parish later joined Wheelock in his anonymously printed attacks on the Board.

The Octagon was completed in 1813 when the Rev. Seth Payson of Rindge, N. H., was elected as Trustee to succeed the Rev. Dr. Burroughs, whose Trusteeship dated back to the days of Eleazar Wheelock's leadership. The President was left with but two supporters on the Board: former New Hampshire Governor John T. Gilman, Trustee since 1807, and Stephen Jacob, Windsor, Vt., lawyer, and Trustee since 1802. It could not then have come wholly as a surprise to John Wheelock when in November 1814 the Board voted that the President be "excused from hearing the recitations of the Senior Class . . .," ostensibly to relieve him "from some portion of the burdens which unavoidably devolve on him." Simultaneously the Senior Class recitations were transferred to Professors Shurtleff, Adams, and Moore. (Up to this time, and until after the controversy was settled, the full teaching complement of the undergraduate college consisted of the President, three Professors, and two tutors. In addition two other Professors conducted the instruction at the recently established Dartmouth Medical School.)

A forcible curtailing of his teaching duties was an indignity which even a less volatile man than John Wheelock could not let pass. For him it was evidence that his situation had become desperate. Henceforth it was to be a battle without quarter. If he were to prevail he must enlist on his side the public and, if possible, the state legislature. To that end he offered to the College Trustees a resolution calling upon the legislature "to examine . . . into the situation and circumstances of the College . . . to enable them to rectify anything amiss. . . ." The Board voted down the resolution. Thus the base was cannily laid for an appeal to the legislature by Wheelock himself, in the role of a victim of a tyrannical Board unwilling to allow the State to examine it.

IT was the age of the printed tract, and John Wheelock chose that medium to arouse those who might support him against the Trustees. Consistent with his attachment to the devious, he elected to publish his diatribe anonymously, though so intelligent a man could hardly have expected that the identity of the author would long remain concealed.

Disingenuously entitling his pamphlet *Sketches of the History of Dartmouth College and Moor's Charity School with a particular account of some late remarkable proceedings from the year 1779 to the year 1815*, Wheelock wrote it during the winter of 1814-15, with the help of his son-in-law, the Rev. William Allen, of Pittsfield, Mass., and Elijah Parish, the man whom Wheelock had been unable to persuade the Board to receive on the faculty. During the composition of the *Sketches* the President and Parish exchanged frequent letters. The correspondence reveals a ludicrously conspiratorial design, and makes it clear that at least Parish derived

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the utmost titillation from the deviousness of its development. It was agreed that the latter should prepare, also anonymously, a *Review* of the *Sketches* for simultaneous publication. Of his *Review* Parish wrote Wheelock in March, "My object has been to keep my own temper and make everybody else angry . . . biting satire where the author . . . seems to say only what he is compelled to say, but yet like a soft secret gas it penetrates the very bones. . . . My object has been to make the reader respect the P_____t, but despise the Pr_____f s & hate the Tr.st__s." In truth this description could have been applied accurately to the *Sketches* themselves. The two pamphlets finally appeared in May 1815, and Wheelock and a few trusted friends immediately caused them to be widely distributed, not neglecting the members of the legislature due to convene in Concord the following month. In this he was aided by Isaac Hill, explosive editor of the *New Hampshire Patriot* and the most unrestrained voice in the State against the Federalist party. Hill saw an opportunity for the Republicans to make common cause with the beleaguered President against a Board of Trustees who, with the single exception of Niles, were Federalists, some possessing considerable influence in the councils of that party. Hill, and the others who took up the cry, found no difficulty in overlooking Wheelock's own record of Federalist sympathies.

THE period 1815-1820, during which the College controversy matured and was resolved, stands as a troubled one for the nation as a whole. The War of 1812 had just come to an end. Throughout the land the Federalist party was in bad repute largely because of an intemperate, single-minded, and some said seditious resistance to "Mr. Madison's war." In New Hampshire, Federalist attitudes had bred a deep distaste among the people, creating a fertile field to root a union of Republican antipathies and John Wheelock's grievances. The prospect of dealing a blow at Federalist pretensions was sufficient inducement to most New Hampshire Republicans to link themselves with the Wheelock cause.

The preparation of the *Sketches* seems not to have been anticipated by the Trustees, and thus the attack fell upon them without warning. In the course of 88 printed pages they found themselves charged, directly or by inference, with a bounteous list of sins: forcible change of "the first principles and design of the institution," misapplication and perversion of College funds, religious intolerance, arresting the College's progress and diminishing its financial resources, advancing the cause of a particular religious sect at the expense of others, neglecting the educational aims, secretly manipulating Board decisions, collusion in electing officers and Trustees against the President's wishes, packing the Board and College offices with supporters, depriving College officers of their religious rights and privileges, supporting a schism in the local church, violating the charter and remodelling the form of government it prescribed, destroying the constitutional rights of the President.

But most important to Wheelock's grand design was the claim that the Trustees held themselves "unamenable to a higher power," that is, to the state legislature. This was a theme that Parish elaborately embroidered in his *Review*, accusing the Trustees of making themselves an "independent government in an independent State," of constituting the Board an "organized aristocracy . . . to manage the State," of possessing a will to "rule the State."

By plan the simultaneous appearance of the *Sketches* and the *Review* was quickly followed by a *Memorial* addressed by Wheelock to "The Honorable Senate and House of Representatives, in General Court convened." In this he recalled "the patronage and munificence" which the State had accorded the College, reminded the legislature of its unique "power to correct or reform" abuses at the College, and cautioned that "those who hold in trust the concerns" of the College "have forsaken its original principles." Wheelock found reason to believe "that they [the Trustees] have applied property to purposes wholly alien from the intention of the donors," that they have "transformed the moral and religious order of the institution by depriving many of their innocent enjoyment of rights and privileges," that they have violated the charter by prostrating the rights with which it expressly invests the presidential office," and committed sundry additional offenses. A delayed fuse produced a final explosion. Said Wheelock, the Trustees were bent upon a "new system to strengthen the interests of party or sect which . . . will eventually effect the political independence of the people, *and move the springs of their government.*"

It was not Wheelock's invitation to the legislature to intervene that by itself so shook the Trustees. Exercises of the State's power in behalf of the College had been sought previously, and with some frequency, at the instigation of the Trustees themselves. But in this instance Wheelock's request for intercession was contrary to an express vote of the Trustees, and rested upon a monumental distortion of the truth. Outrageous as the charges must have appeared to anyone in possession of the facts, they were endowed by their manufacturer with a color of reasonableness calculated to arouse the sympathy of the uninformed. Most serious was the receptivity on the part of those legislators who were willing to regard the Board as a threat to the body politic, and indeed to the survival of democracy itself!

Before the Trustees had had time to develop a strategy for defense, a bill was introduced and passed by a large majority with eager Republican support in the June 1815 session of the legislature. It called for a committee "to investigate the concerns of Dartmouth College . . . and the acts and proceedings of the Trustees . . . and to report a statement of facts at the next Legislature." Wheelock wrote of his satisfaction to his brother-in-law, William Allen: "Our business is accomplished in the whole that I desired in my Memorial . . . the state are friendly to justice and the rights of humanity, and they begin to discover seriously the aristocratic spirit of the *Junto*." Thus the controversy between President and Trustees was almost overnight converted from a subject of loose gossip in limited circles into a major political issue with statewide implications.

The new phase was felt at once in the community of scholars on the Hanover plain. One student wrote to his father in July 1815: "This affair . . . will ruin the College. If the President succeeds the Professors will leave. . . . This will be a death blow to the College, or at least its reputation will be destroyed for the present. But if the President should not succeed it is generally supposed . . . he would establish another college at Concord which would soon rival this on account of the superior local advantages. . . . About 12 of my Class [1818] talk of leaving College to enter some others. . . . Whether the President's charges are correct . . . I cannot say, but this I can say, I believe his conduct has not been altogether blameless."

The legislature's committee of enquiry elected to meet in Hanover in mid-August. Both the President and the Trustees were put on notice to be available for testimony. Wheelock on August 5 sent an urgent letter to Daniel Webster in

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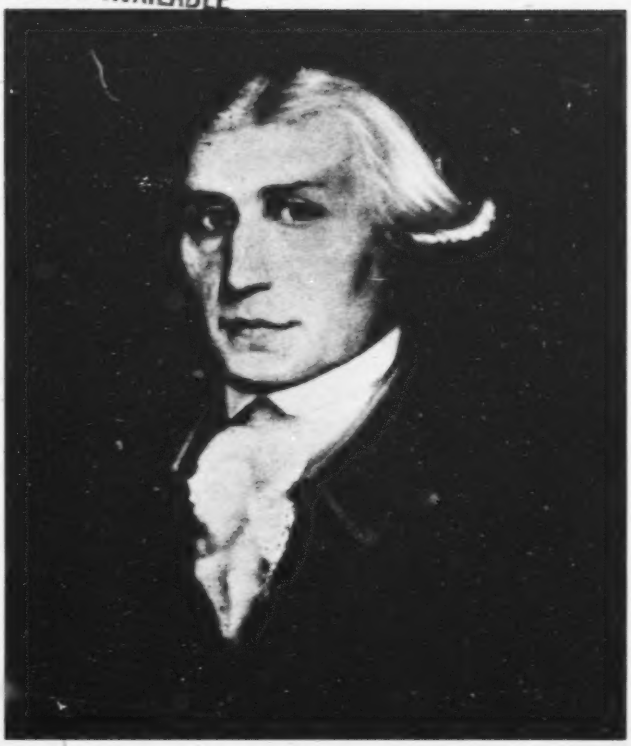
Portsmouth requesting Webster to represent him at the committee hearing. But Webster was away and did not receive Wheelock's plea until too late. Even had he received it timely, Webster, as he later declared, would not have accepted the assignment. In contrast to present-day practice, he did not consider appearance before a legislative committee as a proper engagement of his professional services. He declared icily to a protagonist of Wheelock who upbraided him for letting the President down: "I regard that certainly as no *professional* call, and should consider myself as in some degree taking sides personally and individually for one of the parties by appearing as an advocate on such an occasion. This I should not choose to do until I know more of the merits of the case." Indeed Webster's sympathies already rested with the Trustees. His letter continued: "I certainly have felt, in common with everybody else as I supposed, a very strong desire that the Trustees, for many of whom I have the highest respect, should be able to refute in the fullest manner charges which if proved or admitted would be so disreputable to their characters." And Webster chided his correspondent gently about his readiness to believe ill of the Trustees: "I am not quite so fully convinced as you are that the President is altogether right and the Trustees altogether wrong. When I have your fulness of conviction perhaps I may have some part of your zeal."

As the committee hearing approached, Wheelock's anxieties increased and, having no word from Webster, he engaged Judge Hubbard of the Vermont Superior Court, a Windsor resident, to represent him. The committee met in Hanover at the President's house and at once concluded to "confine themselves to the consideration of the facts" relating "to such subjects as might be presented for this consideration by the President and by the Trustees." The President submitted to the hearing a written "specification of charges" which did not extend beyond a single printed page when later published, as distinguished from the more than 80 pages that made up his undisciplined recital in the *Sketches*. It may be assumed that the constraints of a quasi-judicial hearing and the necessity for supporting his statement by "records, affidavits and other documents" mercifully squeezed out the surplusage.

The substance of the President's written charges was that the Trustees had improperly diverted College funds and had otherwise expended funds extravagantly, and had interfered with the proper functioning of the local church and with the charter powers of the President. The committee's report, not released until the following April, merely summarized the facts relating to the circumstances on which Wheelock relied to support his charges. It refrained from pronouncing judgment on the degree to which the facts sustained the accusations. But no reader could fail to be impressed by how feeble was the evidence, and it was not difficult to read between the neutral and unadorned lines a certain committee impatience with the man who had chosen to heat to the boiling point the internal affairs of the College. One wonders what damping effect the committee findings might have had on later unhappy developments in the legislature had the report received the wide readership attained by the sensational *Sketches*, instead of being obscured for eight months in the committee's files.

A few days after the legislative committee concluded its hearings the Trustees assembled in Hanover for their regular annual meeting, just preceding the Commencement ceremonies of August 1815. Present were the eleven men then making up the full Board of twelve Trustees, Governor Gilman holding office both as an elected and as an *ex officio*



President John Wheelock, from the portrait by U. D. Tenney.

Trustee. After the Board had proceeded routinely through two days of formalities, Charles Marsh introduced on the third day a resolution which took note of "two certain anonymous pamphlets" published since the last annual meeting, and proclaimed:

> Whereas there is reason to believe that some member of this board or officer of the College is the author of or has had some agency in the publication of said pamphlets and whereas said pamphlets contain many charges defamatory to the board and individual members thereof and calculated to injure the reputation of this institution and impair the usefulness thereof, Resolved that a committee of three be appointed by ballot to enquire into the origin of the said pamphlets . . .

For the resolution were the eight votes of the Octagon and against it the votes of Governor Gilman and Mr. Jacob. Messrs. Thompson, Paine, and Payson were named to the committee. The Board adjourned to the following day when its committee reported that while "the nature of the case precludes the committee from obtaining positive evidence . . . evidence of a circumstantial kind has been obtained which leaves no room . . . to doubt that President Wheelock was the principal if not the sole author of the pamphlet entitled *Sketches of the History of Dartmouth College* etc., and that through his means both the pamphlets mentioned were publisned and circulated." The report went on to list the evidence, including numerous public attributions of the *Sketches* to Wheelock "without any disavowal on his part" and "an anonymous letter in the handwriting of President Wheelock . . . sent to Isaac Hill, Editor of the New Hampshire Patriot accompanied with a bundle of said pamphlets in which letter the said Hill was requested to distribute them among the members of the Legislature."

The President, who was not in attendance when the committee reported, was furnished a copy of the report and given

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an "opportunity to offer any explanation he sees fit to suggest" by ten o'clock the following morning. The President did not appear the next day, but filed with the Board a long letter entirely unresponsive to the issue of his role in the preparation and distribution of the *Sketches*. The President concluded by asserting that "considering the Hon^ble^ Legislature of the State have, for the public good taken into their own hands to examine and regulate the concerns of the College . . . it would be wholly improper and unbecoming me to submit to any trial on charges now exhibited before your body. . . . I hereby protest against the proceedings . . . and utterly deny your right of jurisdiction in the present case."

The Board thereupon by a vote of 10 to 0 affirmed its jurisdiction over the subject matter, and accepted the report by the earlier 8 to 2 vote. The Board then adopted by the same 8 to 2 vote a resolution removing Wheelock from the office of President of the College for which the following reasons were recited:

> *First* He has had an agency in publishing & circulating a certain anonymous pamphlet entitled "Sketches of the History of Dartmouth College & Moors Charity School" & espoused the charges therein contained before the Committee of the Legislature. Whatever might be our views of the principles which had gained an ascendancy in the mind of President Wheelock we could not, without the most undeniable evidence have believed that he could have communicated sentiments so entirely repugnant to truth, or that any person who was not as destitute of discernment as of integrity would have charged on a public body as a crime those things which notoriously received his unqualified concurrence & some of which were done by his special recommendation — The Trustees consider the above mentioned public action as a gross and unprovoked libel on the Institution and the said Dr Wheelock neglects to take any measures to repair an injury which is directly aimed at its reputation & calculated to destroy its usefulness.
>
> *Secondly* He has set up & insists on claims which the charter by no fair construction does allow — claims which in their operation would deprive the corporation of all its powers. He claims a right to exercise the whole executive authority of the College which the charter has expressly committed to "the Trustees with the President, Tutors & Professors by them appointed" — He also seems to claim a right to control the corporation in the appointment of executive officers, inasmuch as he has reproached them with great severity for chusing men who do not in all respects meet his wishes & thereby embarrasses the proceedings of the board.
>
> *Thirdly* From a variety of circumstances the Trustees have had reason to conclude, that he has embarrassed the proceedings of the executive officers by causing an impression to be made on the minds of such students as have fallen under censure for transgressions of the laws of the institution, that if he could have had his will they would not have suffered disgrace or punishment.
>
> *Fourthly* The Trustees have obtained satisfactory evidence that Dr Wheelock has been guilty of manifest fraud in the application of the funds of Moors School by taking a youth who was not an indian, but adopted by an Indian tribe under an indian name, and supporting him on the Scotch fund, which was granted for the sole purpose of instructing & civilizing Indians. —
>
> *Fifthly* It is manifest to the Trustees, that Dr. Wheelock has in various ways given rise and circulation to a report that the real cause of the dissatisfaction of the Trustees with him was diversity of religious opinions between him and them when in truth and in fact no such diversity was known or is now known to exist as he has publickly acknowledged before the committee of the Legislature appointed to investigate the affairs of the College.

The Trustees went on to say that they had acted "from a deep conviction that the College can no longer prosper under his presidency."

Governor Gilman and Mr. Jacob, the two dissenters, denied the Board's authority to remove the President, and the charge of fraud against Wheelock in the application of the funds of Moors School as unsupported by the evidence.

The Board then proceeded to elect the Rev. Francis Brown of North Yarmouth, Maine, as President of Dartmouth College, having had indications from one of the Trustees that Brown would not refuse. A committee was appointed to inform Brown and request his acceptance. After adopting a "statement of facts" summarizing what had taken place at this momentous board meeting, the Trustees adjourned, naming a September date one month hence to reassemble.

During the interval there occurred the publication of the Trustees' answer to the *Sketches* which they titled *A Vindication of the Official Conduct of the Trustees of Dartmouth College*. They elected to offer it for purchase only, at fifty cents, though the *Sketches* had been available for the asking and had indeed been thrust upon all willing readers. Those persons who made the effort to secure and read the *Vindication* must have found in it telling answers to accusations made by the *Sketches*. Meticulously drafted (after all it was the joint work of two of the lawyers on the Board) it contrasted sharply with the *Sketches*, both as to claims and style. The tool was the scalpel rather than Wheelock's broad axe, but each was equally dipped in venom.

On September 26 the Board reassembled to welcome Francis Brown to the presidency. Only the Octagon were present for the occasion and for the simple inauguration ceremonies which followed. It was to be the last meeting of the Trustees before the legislature brought down the walls upon them.

From the moment the legislature had appointed its fact-finding committee in the preceding spring there had hung over the Trustees a pervasive worry as to what steps might ultimately be taken. They were mindful that Wheelock's maneuvering had enlisted some highly influential, if shrill, voices among the Republicans at a time when there was reason to expect the Republicans might upset the Federalists in the state elections scheduled for March 1816. Moreover, the probable Republican candidate for Governor, William Plumer, was known to be highly impatient with the controversy that had disrupted the College. The Trustees were likewise mindful that the Wheelock attributions to them of an uncompromising religious orthodoxy would arouse the religious liberals in the State, regardless of their party affiliations.

Many friends of the College shared the Trustees' apprehension. Jeremiah Mason, then a United States Senator, leading Federalist and later one of the College's counsel, had written to his cousin, Trustee Charles Marsh, in mid-August indicating he had heard rumors of the Board's intention to remove the President. "I greatly fear," said Mason, "such a measure adopted under present circumstances . . . would have a very unhappy effect on the public mind." Mason noted that a legislative enquiry was pending and declared that "the Legislature . . . for certain purposes have a right to enquire into alleged mismanagement of such an institution. . . . Should the Trustees during the pendency of the enquiry . . . take the judgment into their own hands by destroying the other party, they will offend and irritate at least all those who were in favor of making the enquiry. . . . If the statements of the President are as incorrect as I have heard it confidently asserted an exposure of that incorrectness will

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put the public opinion right. It may require time but the results must be certain. . . . A very decisive course against the President by the Trustees at the present time would create an unpleasant sensation in the public mind, and would I fear be attended with unpleasant circumstances." Mason excused himself for expressing so strong an opinion on a subject "in which I have only a common interest." He confessed, he said, to being "somewhat influenced by fears that some of the Trustees will find it difficult to free themselves entirely from the effects of the severe irritation they must have lately experienced."

Mason's warning was before the Board at the time the dismissal of the President occurred, and they endeavored to counteract the effects which Mason anticipated by associating with the resolution of dismissal a declaration that "the measure cannot be construed into any disrespect to the Legislature of New Hampshire whose sole object in the appointment of a committee to investigate the affairs of the College must have been to ascertain if the Trustees had not forfeited their charter and not whether they had exercised their charter powers discreetly or indiscreetly — not whether they had treated either of the executive officers of the College with propriety or impropriety." The weakness of the Trustees' disclaimer was that, though it enunciated a good legal principle, the distinction which it drew was too esoteric to make a public impression. Another astute observer correctly predicted a public revulsion at the Wheelock removal which "will probably bring in Plumer [expected Republican candidate for Governor]", and produce a "revolution in the Politicks of the State" to continue until it has "destroyed one of the fairest Literary Institutions of the Country." Such a forecast came perilously close to realization.

The Trustees clung to the hope that their dismissal of the President would in fact quiet down the furor, as was indicated in Marsh's reply to Mason, written after the dismissal had occurred. Likewise clear from Marsh's letter was the conviction that they had no real alternative to the dismissal. "I only regret" wrote Marsh to Mason, "that you, Mr. Webster and some few others could not have been with us [at the Trustees meeting at which Wheelock was removed] and have taken a view of the whole ground." If the President had been left in office, asserted Marsh, he would have retained powers of resistance "which he cannot now call into action. . . . The decisive measure being taken, we think that Federalists who under other circumstances might be otherwise inclined will abandon the concerns of the College to the care of the Trustees and still rally around the standard of political party."

Events moved swiftly in the ensuing months. John Wheelock had warned Francis Brown before the latter's inauguration that he, Wheelock, would continue to consider himself "the rightful President of Dartmouth College" and that he felt confirmed in this view "by the tenor and spirit of the charter and by high authorities in Law." Wheelock conducted himself accordingly and forbade tenants of the institution to pay rent to any but himself. He received communications of support from sundry sources, including one from Elisha Ticknor, successful Boston merchant and father of George Ticknor. Reports from elsewhere in Massachusetts and from Portsmouth indicated widespread sympathy with him. The New Hampshire press, virulent whenever it spoke, was divided in its support, with the balance probably in favor of Wheelock.

William H. Woodward, Secretary and Treasurer of the Board and nephew of the deposed President, had forsaken the Trustees to stand by his uncle; and Mills Olcott, lawyer and long-time Hanover resident, had been appointed to fill

President Francis Brown, painted by S. F. B. Morse.

the Woodward offices. Thus locally the affairs of the Trustees rested in the hands of President Brown and Olcott. Brown sought to establish his authority in the eyes of tenants of College properties. But the latter refused to pay the rents "so long as Doctor Wheelock claims them likewise." This was a blow to the College as it was desperately in need of funds.

Among the Hanover citizenry the majority seemed to favor the Trustees but there were some conspicuous exceptions including, embarrassingly, Dr. Cyrus Perkins, principal figure at the Dartmouth Medical School. For the rest the faculty were in full support of the Trustees. Apprehension among the students is illustrated by a letter which Rufus Choate, then in his first year at Dartmouth, wrote in early March 1816. "Respecting the affairs of this College," said Choate, "everything is at present in dread uncertainty. A storm seems to be gathering . . . and may burst on the present government of the College. . . . If the State be Democratic a revolution will take place, probably President Brown may be dismissed. In that case the College will fall."

As the March 1816 New Hampshire elections approached Trustee Thompson, then attending as a Senator the session of Congress in Washington, wrote his brother-in-law, Mills Olcott, in Hanover: "I do hope & pray that our friends throughout the State will duly appreciate the necessity of making an extraordinary exertion for the preservation of the College. . . ." Thompson, who shared rooms in Washington with Daniel Webster, observed that "we talk up the affairs of learning and politics at a great rate." Trustee Charles Marsh was likewise serving in Washington as a member of Congress from Vermont, and shared lodgings there with his cousin Jeremiah Mason. There were thus unhappily removed from the New Hampshire scene four of its most influential Federalists who might have helped guide opinion in the State away from the Republican view. However, they made the most of their association in Washington, with Marsh filling

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the role of principal correspondent with President Brown and the other Trustees.

The Federalists had nominated James Sheafe for Governor, while the Republicans selected as their candidate William Plumer, a former United States Senator from New Hampshire, and one who had not been reticent in expressing his displeasure at the state of affairs at Dartmouth College. After his nomination Plumer wrote to Col. Ames Brewster, a Wheelock supporter in Hanover:

> From the information I have received from various parts of the State there is a high probability that in every branch of the government this year there will be a Republican majority, and I think a cordial disposition to do justice to the injured Wheelock. If I should have any part to act in the government I will make at least an effort to reduce the wrong he has suffered and repair the injuries that have been arbitrarily inflicted on the literary institution which he has nurtured and over which he has so long and ably presided. Will it not be requisite that his friends in your vicinity should before June [when the new Legislature was to convene] devise a system not only to restore him to his rights but to prevent the College being again exposed to similar evils?

Plumer's election was overwhelming and, contrary to the Trustees' hopes and indeed expectations, it came about not only through Republican support but also the support of many Federalist friends of John Wheelock. That public opinion — or at least opinion in influential circles — was now running against the Trustees became all too clear. In early April President Brown wrote to a clerical colleague who had some acquaintance with the new Governor and with Samuel Bell, Dartmouth 1793, another towering Republican figure whom the new Governor was about to appoint to the New Hampshire Superior Court. Brown spoke of the Trustees' and his own desire to "disseminate correct information among men of influence," deplored "the accidental circumstance that some leading Federalists in the State belong to the Board of Trustees has been seized by Dr. W. as furnishing him with the means of enlisting on his side the political feelings of the opposition party," denied "that political considerations were among the inducements of the Dr's removal," and declared wistfully that "those who have not been brought to act with Dr. Wheelock know very little of the man. And those who have long acted with him are frequently surprised by some new exhibition of his character." Brown covered dispassionately and in some detail the facts of the controversy from the Trustees' viewpoint, and then concluded with the following appeal:

> I have thought that at this time of excitement and general anxiety respecting the College this communication might not be unacceptable to you nor without its use to us. In the company of your friends I wish you to make that use of its contents which you judge to be prudent and proper. I mention particularly the Hon. Sam' Bell with whom I have not had the pleasure of an acquaintance, but who has been a Trustee of the College and who I think might employ an influence for our benefit. With the Hon. Mr. Plumer's feeling in relation to the College I have not been made acquainted. I have no doubt however that measures have been taken before this time by Dr. W. to induce him to insert a paragraph into his speech or message at the opening of the Legislature bearing on the Trustees. I hope he will think proper to omit the College dispute altogether or if he should speak of it to avoid anything more than to announce the general subject.

Meanwhile Congressman Marsh in Washington, through letters to President Brown in Hanover and to the other Trustees, endeavored to develop a strategy to forestall action by the legislature adverse to the Trustees. But only Senator Thompson among the principal Washington strategists could be in Concord for the opening of the legislature in June. There he was joined by his fellow Trustees, Asa McFarland and Elijah Paine, as representatives of the Board, and President Brown was likewise on hand to observe the events affecting the College.

When Governor Plumer addressed the legislature on June 6 he noted that the College's charter had "emanated from royalty" and "contained . . . principles congenial to monarchy," including the provision for a self-perpetuating Board of Trustees. This provision he called "hostile to the spirit and genius of a free government." Plumer claimed a right for the State "to amend and improve acts of incorporation of this nature." The Governor's message and the belated report of the fact-finding committee which had met in Hanover the preceding August were referred to a special committee of legislators. Without waiting for the report of the Hanover hearing to be printed the special committee brought in a bill entitled "An act to amend, enlarge and improve the Corporation of Dartmouth College." Despite formal remonstrance by the representatives of the Trustees and an offer by them, fortunately rejected, to compromise by accepting a Board of Overseers drawn from State officers with a veto over the Trustees, an act was passed by both houses voting along party lines.

To concede by hindsight that Jeremiah Mason was right and the Trustees wrong in their evaluation of the consequences of their dismissal of John Wheelock by no means leads to a conclusion that the dismissal should not have been made when it was. With comfortable Republican majorities in both houses of the legislature supporting a Republican Governor, it is probable that forbearance on the part of the Trustees would not have forestalled the fateful June 1816 legislation. On the other hand, if they had continued to be saddled with an antagonistic President and had lacked the extraordinary leadership of the new President Francis Brown, their capacity to resist the consequences of the legislature's determined attack would have been immeasurably reduced.

The legislation altered the name of the institution from the "Trustees of Dartmouth College" to the "Trustees of Dartmouth University."* It increased the number of Trustees from 12 to 21, "the majority of whom shall form a quorum for the transaction of business" (a petard which later hoisted the University Trustees in a most embarrassing way). The new Board was given "all the powers, authorities, rights, property, liberties, privileges and immunities which have hitherto been possessed . . . by the Trustees of Dartmouth College." Another provision created "a Board of

* To avoid confusion between the two Dartmouths each of the terms "University" and "College" is reserved for only one of the institutions. This exclusivity, while a convenient artifice, does not accord with the practice of the period. Before the forced duality of the institution, persons identified with Dartmouth frequently used the term "university" in a generic sense to apply to the College. So too the authorities of the University during its brief life, occasionally used "College" adjectively in referring to elements of the University, as for example "the College chapel."

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Overseers, who shall have perpetual succession and whose number shall be twenty-five," with power to "confirm, or disapprove . . . votes and proceedings of the Board of Trustees." From New Hampshire the President of the Senate and the Speaker of the House, and from Vermont the Governor and Lieutenant Governor, were made *ex officio* Overseers. The New Hampshire Governor and Council were given authority to "fill all the vacancies on the Board of Overseers" and "complete the present Board of Trustees to the number of twenty-one . . . and . . . to fill all vacancies that may occur previous to, or during the first meeting of the said Board of Trustees." Finally the Governor was authorized "to summon the first meeting of . . . Trustees and Overseers to be held at Hanover on the 26th day of August next."

The effect of the enactment upon the Trustees was stunning; nor was it the more acceptable for being inevitable. "I cannot endure the pain," wrote Senator Thompson who had witnessed the legislature's headstrong attack, "to recollect the proceedings . . . much less can I bring myself to write the disgusting details. . . . Our friends belonging to the Legislature and every other one whom I have met advise us to refuse to accept the new act or to accede in any shape to the new Legislature's modifications." A few days later Charles Marsh, in response to an enquiry from President Brown, gave his view that "the act is altogether unconstitutional and must be so decided could the question come before a competent and dispassionate court." Marsh, too, urged resisting the act rather than yielding. Thompson on a visit to Portsmouth, where he found much pro-College sentiment, conferred with his fellow Trustee, Timothy Farrar, and with Daniel Webster and Jeremiah Mason. He reported their common view to be that the Trustees should "maintain the original corporate rights and try the issue." Farrar urged an immediate approach to Jeremiah Smith, as well as to Mason and Webster, to obtain their guidance as to what specific measures should be pursued.

Thompson recommended that President Brown call a meeting of the Trustees for late August to decide upon a course of action. The meeting should be, said Marsh, "in precisely the same style as though the Legislature [had] not attempted to interfere." He stressed the importance of the Trustees avoiding "every act which can be construed into a recognition of the authority of the Legislature to encroach on our powers and rights in the manner they have attempted to do. . . . Our adversaries must be aware that . . . we shall at some time or other be able to . . . unravel all their proceedings. This consideration will probably check them more than any other. . . . The measure of *resistance* . . . is the only one which . . . affords any share of hope. . . . [We must] go as far as we can . . . to execute the powers vested in us by the Charter, and when we have gone this far to adopt the Quaker system of withholding our active cooperation in anything done by others — we must continue to keep this corporation alive."

These brave words, at a dismally low point in the College's fortunes, were a clear call to civil disobedience. But Marsh also had an eye for the practical difficulties, of which one was the College's extreme shortage of funds. Particularly was he solicitous about the precarious financial situation of President Brown. "I feel this subject much at heart" he wrote the President, "and especially when I reflect how much trouble and anxiety you . . . have experienced." Characteristically, Brown seemed to worry far less about his plight than did his associates.

Meanwhile, in late July the Governor and Council, exercising their new authority, appointed nine new "Trustees of Dartmouth University," which with the twelve old Trustees would complete the complement of twenty-one prescribed by the legislature. At the same time, the twenty-one members of the new Board of Overseers were named. That advance consent to serve had not been obtained in all cases is evident from the refusal of membership by Justice Joseph Story of the United States Supreme Court whom Plumer had listed among his appointments.

The legislature had carefully prescribed August 26 as the date of the first meeting of the new Board, and Hanover as the location. When the Governor sent notices of the meeting to the old Trustees the responses were in most instances discreet and noncommittal. The replies of Trustees Farrar and Payson were perhaps a bit more expansive than the circumstances required, but this merely illustrated that while these two men were actively aligned with the Octagon, they were by age and preoccupation a bit more removed from the center of strategy planning than were, for example, Marsh, Thompson, McFarland and, of course, Brown.

President Brown issued his call for a Hanover meeting of the College Trustees for the same date that the statute had fixed for the University Board meeting. When the appointed time arrived — Monday, August 26, 1816 — there ensued a ludicrous two-day minuet between Governor Plumer, as temporary chairman of the University Board, and President Brown, each declining to recognize the existence of the other's Board. Plumer and his followers met in the office of the disaffected College Treasurer, William H. Woodward, while the College Trustees met in the study of President Brown. At the Plumer meeting but nine persons were in attendance out of the full complement of twenty-one. Among these was Stephen Jacob, the only Trustee present from the old Board. Others formerly identified with the College were William H. Woodward and Cyrus Perkins. Also in attendance was Levi Woodbury, Dartmouth 1809, later appointed by Governor Plumer as judge of the New Hampshire Superior Court.

Present at the meeting of the College Board, in addition to President Brown, were Thompson, Farrar, Paine, Marsh, McFarland, Smith, and Payson. Of the Octagon only Niles was missing. By that time all had formally declined to attend the Governor's meeting. The old Board's first act of business was to adopt a defiant resolution of resistance: "We the Trustees of Dartmouth College do not accept the provisions of an act of the Legislature of New Hampshire approved June 27 . . . but do hereby expressly refuse to act under the same."

President Brown immediately transmitted the resolution to the University Board. The point of no return had in effect been reached.

At least the five lawyers among the Octagon could have been under no illusions about the seriousness of the step they had chosen to take. Yet the solemnity of the situation had it moments of comic relief. The old Trustees saw their strategy succeed when the unhappy Governor Plumer, after fruitless summons to President Brown and associates to attend the University Board meeting, was unable to obtain a quorum. In consequence the Governor was forced to declare his meeting adjourned, without his Board having been able even to organize, to say nothing of taking substantive action.

It was not an outcome designed to endear the old Trustees

to the Governor. Nor was his discomfiture relieved when he learned that so tightly had the legislature seen fit to prescribe the time and place for the first Board meeting, and his powers with respect thereto, that a miscarriage having occurred, he was without authority, until corrective legislation could be obtained, to call another meeting.

This contretemps left Francis Brown, his Board, and his loyal faculty unexpectedly in undisputed charge of the institution. The 1816 Commencement exercises followed immediately upon the Trustees' decision to resist. It was to be the last such ceremony without threat of University interference until 1819. The occasion produced an unexpected and munificent gift to the College from John B. Wheeler, an Orford N. H., merchant. His donation of $1000 was intended to enable the Trustees, in his words, "to test their rights by a suit at law." The amount was the equivalent of two-thirds of a whole year's endowment income. While the full measure of the Trustees' gratitude was not registered until nearly ninety years later when a new dormitory was named Wheeler Hall, the gift produced immediate and enormous benefits, both real and psychological.* Over the College community hung the full weight of ultimate uncertainties. "It is to be feared that the best days of this institution are over," wrote one student to a friend. "Should the game be pursued the sons of Dartmouth may prepare to see their alma mater thrown into convulsive agitation from which she cannot recover . . . we may expect an overturn here. In that case I shall go to some other college."

The College Trustees again gathered in Hanover for a Board meeting of their own on September 29, 1816. Their first act then was to issue a call to William H. Woodward, still officially holding the office of Secretary of the Board, to attend and deliver "the records and seal appertaining to the office of Secretary." Not unexpectedly Woodward refused either to attend or to deliver the items demanded, whereupon the old Trustees removed him from office and appointed Mills Olcott in his stead.

The reopening of College in October produced about the same number of students as in the preceding academic year, reported Professor Adams. The Professors found, too, that in Hanover "current opinion has been setting more and more favorably for the old Trustees ever since Commencement." A quiet but determined contest prevailed between the officers of the two institutions to collect rents on College properties; but the tenants, understandably, continued to refuse risking wrong payment.

In November the Governor requested enabling legislation to permit calling the University Board together. The legislature readily responded in December by amending the quorum requirements and resolving ambiguities as to the Governor's authority to assemble the new Board. Student Rufus Choate on December 16 in a letter to his brother described the new legislation as "authorizing nine of the new Trustees only to do business, a number which it is supposed can very easily at any time be assembled. That the body will convene immediately perhaps before the end of the term and remove the whole of the present government of the College and supply their places with men of their own party is what the best informed among us confidently expect."

As the year 1816, so full of portent, drew to a close, President Brown polled his Trustees on a proposal to attempt through the courts to obtain a recognition of their charter rights and a rejection of the legislature's effort to alter them. Brown noted that Mills Olcott was securing an informal opinion from Jeremiah Mason on what action to take. Before replies could be received from the Trustees the legislature took a further step, seeming to justify Marsh's earlier judgment expressed to Brown that "no one can tell . . . what in the wantonness of power they may have the madness to attempt." On December 26, 1816 there was passed a statute which came to be known as "the penal act." It provided that anyone who purported to exercise authority on behalf of the institution, except pursuant to the legislation which had established the University, would be subject to a forfeiture of $500, "to be recovered by any person who shall sue therefor, one half thereof to the use of the prosecutor and the other half to the use of said University." This oppressive hunting license contained the possibility of breaking the old Trustees, as well as the faculty associated with them in operating the College. The $500 penalty was not limited to but one application; it extended to each forbidden act by each individual. Thus, in the course of a single meeting of the old Board each Trustee could conceivably be exposed to a dozen forfeitures each of $500, depending on how many pieces of business were handled at the meeting. The conducting of every class of instruction subjected each loyal faculty member to a similar forfeiture.

JANUARY 1817 was an anguished month for the College Trustees. The "penal act" put their strength of purpose to a severe test. Particularly worried was Senator Thompson whose family obligations and financial resources seemed precariously balanced. Marsh, too, suffered moments of indecision. On the other hand, Judge Farrar ("the sooner the question is decided the better it will be for the College") and Judge Paine ("the only way is to persevere fully in the old order. . . . We ought not to look back") urged a prompt contesting of the legislation. Perhaps bravest among the Trustees, because he trusted most, was the Reverend Asa McFarland, Concord clergyman and youngest member of the Board. Unlearned in the law himself, he supported solely on faith a prompt initiating of legal action. The disquietude of Thompson and Marsh subsided, and by the latter part of January they were in full, and indeed enthusiastic, support of a course of resistance to the end.

It is impossible to weigh fully the influence of an occurrence of the first importance at this moment. Hamilton College, having just lost its president by death, offered the succession to Francis Brown, at double his Dartmouth salary, and of course with assurance that his compensation, whatever it was, would in fact be paid. Hamilton was already a well-established, highly respected, and relatively prosperous college with an unclouded future. That Brown, despite this temptation and under the most trying conditions, elected to remain as the head of an institution with so dubious a future is telling evidence of the character of this extraordinary man. It is hardly an exaggeration to say, as surely his Trustees themselves felt, that Dartmouth College would have suffered a staggering blow in Brown's departure. There was literally no one else to carry on his kind of inspired leadership, with-

* Throughout the controversy the College was constantly in need of funds. Solicitations among alumni and friends went on almost without interruption. Though none was the equal of, nor yet approached, the Wheeler gift of 1816, contributions were steadily fed into Hanover. Individual gifts of fifty cents, a dollar, two dollars, came in from many. There were fewer at five and ten dollars. Twenty dollars marked almost a summit. Rare indeed was the donation of fifty or one hundred dollars. Yet they all added up to sustain the College, precariously it is true, through a period of crisis.

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out which the whole cause of the College might well have foundered. Brown's decision put new strength and determination into the Trustees.

Next to be faced was a troublesome, if secondary problem. Throughout much of the nineteenth century, American courts and lawyers were severely trammeled by a complex of intricate formalities and procedural requirements for commencing litigation. Inherited from English common law, the rites, whatever may have been their justification in earlier centuries, had become by this time obsolete accretions serving only to trip up litigants and their lawyers and to harass courts with a proliferation of hearings on basically irrelevant issues. The launching of a suit by the Trustees was, in common with others at this period, beset by the peril of selecting the wrong procedural approach and in consequence encountering an adverse decision on what today would be regarded as an unconscionable technicality. Diverse views among the lawyer Trustees on precisely what form of action to elect were at last resolved, with the aid of counsel, by fixing upon an action in trover against William Woodward in the name of the Trustees of Dartmouth College for the recovery of the minutes of Trustees meetings, the original charter, the seal, and sundry account books, all of which Woodward had retained in his possession on his defection to the new Board.

On February 8, 1817 suit was initiated in the Court of Common Pleas for Grafton County and immediately transferred to the Superior Court of the State of New Hampshire. This was then the State's highest court and ordinarily an appeal court, but the lower Court of Common Pleas was bypassed because the defendant, William Woodward, was himself a judge of that court. Thus the Dartmouth College Case began.

While the strategy of the College had been taking shape, the cause of the University had been suffering. Not until February 4, 1817 did the University Trustees come together in Concord for their first regular meeting. Even then it took two days before a quorum could be obtained, so unwieldy was the size of the Board and so devoid of deep commitment were most of its members. Meanwhile, the two principal University adherents in Hanover had become seriously incapacitated by ill health. Woodward himself, on whom much depended, was so plagued by illness that he briefly contemplated not attending the Concord meeting. But, more seriously, John Wheelock's health had so declined that it was clear his affliction was terminal. The University Trustees were thus denied on-the-scene agents comparable in interest, if not in ability, to Francis Brown and Mills Olcott for the College, a deficiency which was not overcome by the recruiting of William Allen and Dr. Cyrus Perkins in corresponding positions for the University.

The University Board proceeded at the Concord meeting to "discharge and remove" from office President Brown, the resisting Trustees, and the two non-cooperating faculty members, Professors Roswell Shurtleff and Ebenezer Adams, all of whom until then nominally held University positions on the theory that the University was successor to the College. Fully recognizing that the state of Wheelock's health precluded his serving as president of the University the new Trustees nonetheless elected him to that office, providing at the same time that the duties of the presidency should be discharged by Wheelock's son-in-law, William Allen. The latter was likewise appointed Phillips Professor of Theology to succeed the deposed Shurtleff. Allen, then 33 years old (he and Francis Brown were only nine days apart in age), was a graduate of Harvard. Son and grandson of clergymen, he had studied theology in Brookline, Mass., and in 1810 took over his father's First Congregational Church in Pittsfield, Mass., where he remained until coming to Hanover in 1817. In 1813 he had married Maria Malleville Wheelock, John Wheelock's only child. Allen has been variously described by contemporaries as "inflexible," "stately," "stiff," "unyielding." His manner was said to provoke opposition both from students and associates.

The University Trustees appointed three of their Hanover adherents, Dr. Cyrus Perkins, Amos Brewster, and James Poole, as "superintendants of the College buildings" and directed them "to take possession of the College [as Dartmouth Hall was then known], Chapel and Commons Hall . . . and cause them to be well provided with suitable fastnesses and prevent intrusion by any." This triumvirate made demand on President Brown for the key to the Chapel and on Professor Shurtleff for the key to the library. Both declined to accede, whereupon the "superintendants" without further formalities occupied Dartmouth Hall ("the College"), which housed the library, and the adjoining chapel building. This confrontation was brief and, unlike a later one, nonviolent. In early March Rufus Choate reported the affair from the student viewpoint in a letter to his brother:

> The partisans of Plumer . . . took possession of the College buildings and Library and opened the campaign . . . by uniting in prayer literally with but a single student in the Chapel! President Brown and friends immediately engaged a large and convenient hall as a chapel and entered it that same morning with every scholar in town but the one above-mentioned. The students [have] now nearly all [returned for the opening of a new term] and the following is the number on the side of the university: freshmen none, Sophomores 2, juniors 1, seniors 4; total 7. Possibly 2 or 3 more may join them. . . .

Another student, a junior in the College, wrote to his brother:

> The College students have equally as good instruction as they have had for years past, and their advantages are the same except that we have not access to the College Library. However there are such a variety of books in the Society Libraries it is not considered much of a loss. . . . It appears to be the determination of the old officers not to be frightened from their ranks until it be legally decided, and if it be determined against them, and there is no appeal, undoubtedly a large number of the students will leave. They will not join the University. We wait with anxiety to know the results.

New-Hampshire Executive Department.

Concord, *December* 20, 1815.

Sir,

In pursuance of a law of this State, you are hereby informed, that a meeting of the Trustees of Dartmouth University will be holden on Tuesday the fourth day of February next, at two o'clock in the afternoon of that day, in the hall, commonly called Mason's hall, over the bank in the southerly end of the main street in Concord, in the county of Rockingham. And your attendance as a Trustee of Dartmouth University is requested at that time and place, for the purpose of transacting such business as shall then and there appear necessary to be done to promote the interest and prosperity of that institution.

I am respectfully,

William Plumer Governor.

Governor Plumer's call for a meeting of University Trustees.

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Dr. Nathan Smith, iconoclast, founder and professor of the Dartmouth Medical School, wrote to Mills Olcott from New Haven: "If there should be a prospect of a pitched battle between the College and the University I hope it will take place before my arrival, as I have not forgotten the sage advice of Falstaff that it is best to come in at the beginning of a feast, and the latter end of a fray."

Though Choate scornfully dismissed the few students who supported the University authorities, the students on the side of the College did not possess all the commitment. A member of the Class of 1817 wrote in early April:

> When I reached Hanover I found division among the students. . . . I did not hesitate to enlist under our ancient President [Wheelock] though his followers were but few, only fourteen and they are but fifteen now. . . . I did not wish to join to assist men whom I considered to be engaged in a bad cause. . . . Dr. Brown, Adams, Shurtleff have left the university and are reduced to the miserable necessity of making a hall a sanctuary for their divinities and to occupy kitchens for recitation rooms. They have no library . . . and teach as private instructors, each class pay their own masters. . . . The situation of the old Board is, as all parties ought to be who resist the laws, distressing.

Almost the last rational acts of John Wheelock were three for the benefit of the University. The first was a conveyance to the University of extensive lands to support a president, contingent upon the validity of the legislation creating the University, and to revert to Wheelock's heirs if the legislation failed. Second was a release to the University of a debt of $6000 said to be owing to him for back salary. Third was the execution of his will granting further lands to the University to establish professorships in Mathematics and Greek, again with the proviso that if the legislation on which the University rested should fail the lands should go elsewhere, this time not to his heirs but to the General Assembly of the Presbyterian Church for the use of the Theological Seminary at Princeton University. The unevenness of his signatures on these documents evidenced the critical state of his health.

The following month John Wheelock died, mercifully spared knowledge of the outcome of his elaborate scheme to put down his enemies. William Allen was elected to succeed him as President of Dartmouth University. One is impelled to reflect on what would have been the result for Dartmouth, and for other private educational institutions, had the Trustees not so constricted Wheelock that he felt driven to break openly with them scarcely a year and a half before his death. With a few more months of Trustee forbearance the chain of events that radically altered the history of private education in America might not have been set in motion.

An almost fortuitous union of forces brought about the successful weathering of the College's ordeal. Evidence of two of these has already been seen: the profound personal involvement of several key Trustees, and the steadfast leadership of President Brown. Now to unfold was a third: the preeminence of the College's legal counsel. It is doubtful that the final triumph could have come about had any one of these three elements been lacking.

Beyond all challenge the two senior leaders of the New Hampshire bar at this time were Jeremiah Smith and Jeremiah Mason. Smith, a native New Hampshireman and in his 59th year when the case opened, had been in practice or on the bench for nearly thirty years. During that period he had also served New Hampshire in the United States Congress, fulfilled one term as Governor of the State, and ten years as its Chief Justice. With the defeat of the Federalists in 1816 he had returned to private practice in Exeter. A strong Federalist and hostile to Jeffersonian doctrines, Judge Smith had a reputation for caustic wit which he visited freely, in and out of court, upon friend and foe alike.

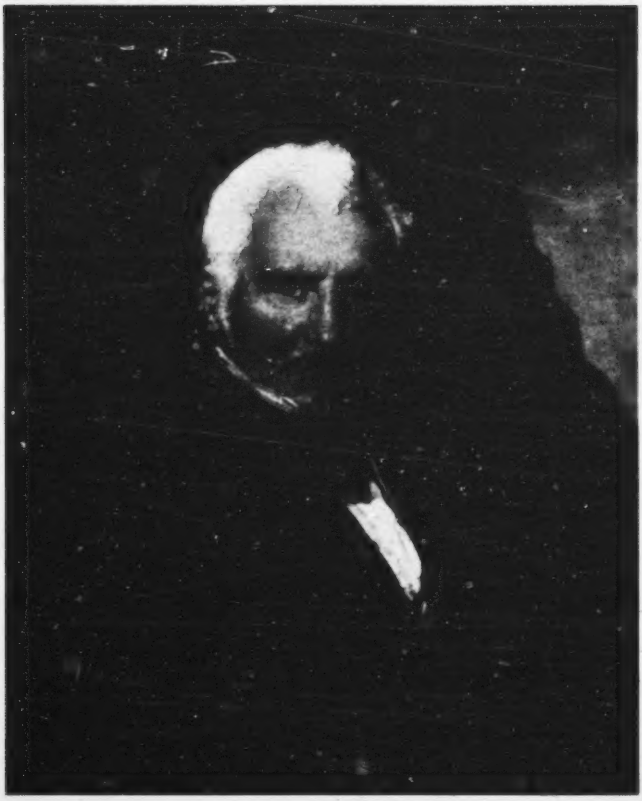
Mason, nine years younger than Smith, was born in Connecticut. After graduation from Yale he came to New Hampshire, later taking up residence in Portsmouth, then the largest town in the State. For many years he held undisputed supremacy among Portsmouth lawyers, challenged only by Daniel Webster during the latter's brief practice in that place. During his long residence in New Hampshire Mason served as Attorney General of the State and as a Federalist member of the United States Senate. In 1816 he declined to accept appointment as Chief Justice of the New Hampshire Superior Court. When the Dartmouth College Case came on for trial before that court Mason was considered to be among the greatest lawyers of his time. Standing six feet and six inches, he was an imposing courtroom figure.

The third and junior counsel was Daniel Webster, then 35 years old. As the only Dartmouth alumnus among the three, his relation with the College had been more intimate than the others, though Smith as Governor of the State had served briefly as an *ex officio* Trustee. In 1816 Webster moved from Portsmouth to Boston. When the case opened he was still much occupied in getting established in his new location, and perhaps in consequence of that his role in the litigation while it was before the New Hampshire court was minor, compared with the participation of Smith and Mason.

It is not clear why Mills Olcott, acting as the Trustees' agent, delayed so long after filing suit before formally retaining counsel. Two months earlier he had consulted Jeremiah Smith on procedural technicalities, and in Washington, Marsh and Thompson had maintained a dialogue on the issues with Jeremiah Mason, fellow member of the national legislature. By letter Thompson too had laid a few of the questions before Webster for his informal views. But as late as mid-April 1817, and only a month before the first hearing of the case was due to occur, there was still some ambiguity about who was representing whom. A friend of the College wrote from Portsmouth to Francis Brown on April 11 that Mason had just turned aside an approach by the University to represent its side, at the same time asserting that "he has not been at all consulted [by the College] in the commencing or conducting of a suit." Thompson wrote to Olcott as late as April 25 saying "Judge Smith talks as if he were not under obligation to prepare himself to argue our College cause next month. I do not know what this means. . . . If any further application is necessary or any fee pray take the necessary steps."

The "necessary steps" were in fact timely taken, for both Mason and Smith appeared at the May term of the Superior Court held in Grafton County at which *Trustees of Dartmouth College vs. Woodward* was docketed. While the principal arguments in the case were deferred until the September term, it appears that Mason at least made a beginning at the May term in Haverhill, for we find Webster, who was not present at this term, writing to Mason in June that "the College people thought you made a strong impression in their cause."

The reputation of both Smith and Mason before the New Hampshire courts made their services in great demand. The case of Dartmouth College was but one of many litigations requiring their attention. To the Trustees and the President, on the other hand, the case transcended all else. One may



Jeremiah Smith, portrait by Francis Alexander.

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suspect a slightly lesser degree of personal involvement on the part of Mills Olcott as the Trustees' agent for the suit. After all he was himself a busy lawyer and, though secretary of the Board, he was not a Trustee. Thus his hide was notably more remote from a threat of goring than were those of the President or the Board members. A letter from Brown to Mason in early August leaves it unclear whether the President detected a lack of diligence on the part of Olcott, or whether he was merely demonstrating a common concern among clients lest their counsel neglect their cause for a competing one. Brown assured Mason:

> Unnecessarily to intrude, even in a concern deeply interesting to myself and friends, upon a gentleman much engaged in public business has hitherto prevented me from writing you. The agency in the College cause is committed by a vote of the Trustees to Mr. Olcott in whose judgment and zeal we all have certain confidence and I have feared it would not be welcome to you to be occupied by letters from the College officers. An omission to write is not, however, to be construed as evidence either of indifference to the cause at issue or of a want of becoming respect and courtesy to one on whose talents and exertions we rely for its support. This consideration forbids any longer delay.
>
> I can think of no other question, except one which should be related to personal character, on the decision of which consequences depend so important to myself and to the other officers of the College as that for which your services are engaged. In case of a failure we will be cast, either without property or but little, upon the world. Some of us have large and all of us growing families and must seek new spheres of action and new means of support. This is a condition in which we should of course be very reluctant to be placed. Add to this that we regard the services of the Charter Trustees as being essential to the prosperity and usefulness of the Institution, and as deriving still greater importance from its bearing on the stability of all similar literary corporations in our country

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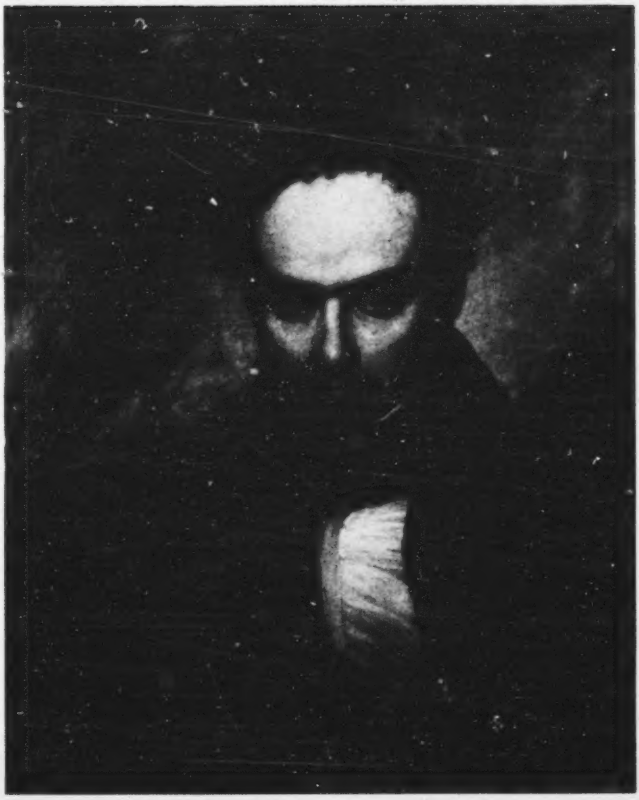
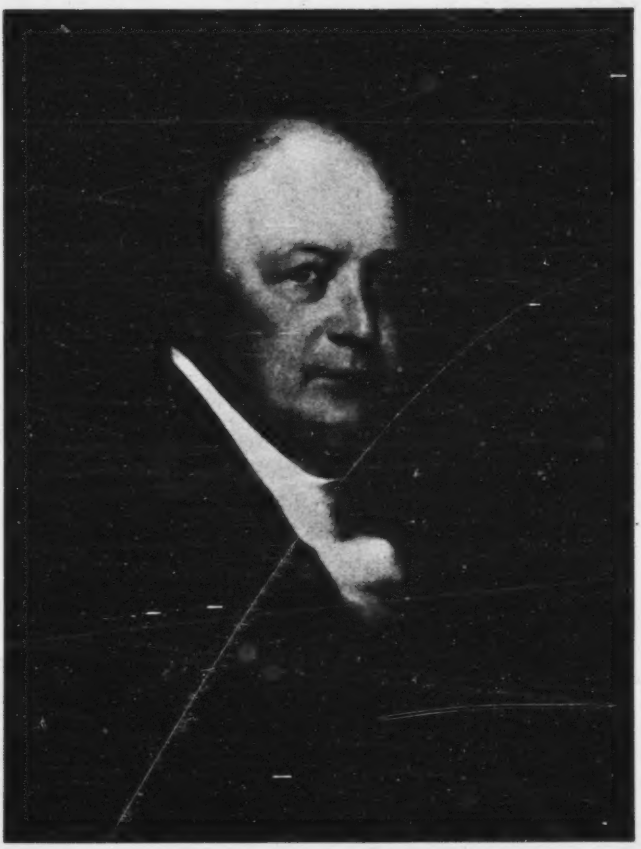


Daniel Webster, portrait by Francis Alexander.



Jeremiah Mason, portrait by Chester Harding.

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> To the Trustees on a recent occasion when I had the offer of an eligible establishment in New York [Hamilton College] I formally proposed the question, in case of my remaining here I must expect them if necessary to prosecute their suit to final decision, though to the Supreme Court of the United States. They promptly and decisively answered in the affirmative. We are not without hope that a favourable decision be given in our Court; though it be otherwise, you may be assured the cause will not be abandoned. I mention this because I have understood that some doubt has been expressed by Judge Smith or yourself whether the Trustees would have the resolution to go forward.

The University, in session since its Board was able to organize in February, elected to hold its first Commencement exercises, in 1817, on the customary date in August long prescribed in the College bylaws. The College, operating of course under the same bylaws, scheduled its Commencement exercises for the same date. On a collision course, each institution asserted its right to use the Meeting House in accord with established practice.

As the day approached rumors of a forcible seizure of the Meeting House by University adherents aroused the students in the College. To forestall any such design, about sixty of the College students and their sympathizers occupied the building, arming themselves with canes and clubs. A counter mobilization of University forces was met determinedly by a heavy guard at each lower window and a battery of stones poised for release at all upper windows and the belfry. The University forces withdrew.

Efforts on the part of President Brown to bring about a compromise by settling on different hours for the respective exercises met with insistence by William Allen that the University have precedence. Those in possession were unwilling to accord it. On Commencement day, seemingly by common consent at the last moment, the College procession moved into the Meeting House at the usual hour of 9 a.m., and the University delayed until 11 o'clock, when its procession marched to the much smaller Chapel in the College yard. Confrontation had been avoided. On that day the College graduated thirty-nine and the University eight.

THE opening of the fall term of the New Hampshire Superior Court at Exeter was scheduled for the following month. The case of the College against the University was set for hearing. Some days before the hearing Webster wrote, on September 4, to Jeremiah Mason in Portsmouth:

> Judge Smith has written to me, that I must take some part in the argument of this college question. I have not thought of the subject, nor made the least preparation; I am sure I can do no good, and must, therefore, beg that you and he will follow upon your own manner the blows which have already been so well struck. I am willing to be considered as belonging to the cause and to talk about it, and consult about it, but should do no good by undertaking an argument. If it is not too troublesome . . . give me a naked list of the authorities cited by you, and I will look at them before court. I do this that I may be able to understand you and Judge Smith.

When the session opened all three of the College's counsel were present, as were their opponents. The University had retained George Sullivan, New Hampshire Attorney General, and Ichabod Bartlett, Dartmouth 1808, young Portsmouth lawyer and briefly there a local rival of Daniel Webster. Sullivan was a Dartmouth University Overseer and Bartlett one of its Trustees.

The State's highest court consisted of three judges, all appointed by Republican Governor Plumer following his election the year before. Of the three, only the Chief Justice, William Richardson, lacked close party identification. The two Associate Justices were Levi Woodbury and Samuel Bell, both active Republicans. Bell, then 47 years old, was a graduate of Dartmouth in the Class of 1793. He had also served as a Dartmouth Trustee from 1808 to 1811. Woodbury, aged 28, was likewise a Dartmouth alumnus, having been graduated in 1809. Ahead of Woodbury lay an extraordinary career, as Governor, Senator, Associate Justice of the U.S. Supreme Court, and, just prior to his death in 1851, as a likely Democratic candidate for President of the United States. Shortly before his appointment to the New Hampshire Superior Court, Woodbury had been named by Governor Plumer as one of the Trustees of Dartmouth University. While conflicting reports make it inconclusive whether or not Woodbury in fact sat on the College's case at that term, both charity and the probabilities suggest that he properly disqualified himself.

The parties to the suit, through their counsel, had previously agreed upon a statement of facts involved in the case. The statement was accepted by the Court as the basis for the arguments.

Mason opened the argument for the College. No stenographic record exists, but when Mason, more than a year later, reconstructed the argument for publication, it occupied nearly thirty closely printed pages. In effect it was an enlargement of the same points that the Octagon made less forcefully a year before in the preamble to their declaration of resistance to the legislative acts. These points, in the order chosen by Mason, were: (a) that Dartmouth College under its charter was a private eleemosynary corporation and not a public corporation such as a city or county, and that in consequence the corporation had legal rights and interests which could not be taken away by the state legislature; (b) the acts in question exceeded the general scope of legislative power because in effect they attempted, without the consent of the Trustees, to abolish the old corporation and transfer its property and privileges to a new one; yet under the essential division of powers upon which a free government rested, no legislature possessed the power to alter private rights; (c) even if, in the abstract, such a power might be claimed to rest in the legislature, the constitution of the State of New Hampshire had expressly declared that none may be deprived of property or privileges "but by the judgment of his peers or the law of the land"; (d) in short, this deprivation could not take place "without due process of law" and from this it followed that the powers which the legislature had attempted to exercise in fact rested solely in the judiciary; and finally, (e) the charter contained all the elements of an executed contract comparable to a grant of land, and was thus protected by that clause of the United States Constitution which provided that "no state shall pass any . . . law impairing the obligation of contracts."

The argument was learned and replete with citations of authorities to support it. With the knowledge that Thomas Jefferson had congratulated Governor Plumer on his and the legislature's move to convert the College into a state-controlled institution, Mason must have taken sly satisfaction in selecting one of the supporting dicta from Jefferson's *Notes on the State of Virginia* which declared that "an elective despotism was not the government we fought for." Mason concluded with a reference to the far-reaching consequences of the issues involved, which had by now aroused the concern of many beyond the bounds of this particular suit. "If

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these acts are held to be valid," he stated, "not only this College but every other literary and charitable institution must become subject to the varying and often capricious will of the legislatures. . . . If our seminaries of learning are to be reduced to a state of dependence on the legislatures, and are to be new modelled, to answer the occasional purposes of prevailing political parties, all hopes of their future usefulness must be abandoned."

Attorney General Sullivan, who responded for the defense, was aware that before a determination could be made as to whether the New Hampshire legislature had exceeded its competence, it was necessary to establish what kind of corporation Dartmouth College was. Mason had contended it was a private eleemosynary corporation, and his argument rested upon an acceptance of that classification by the court. Thus Sullivan vigorously took the position that the College was "a public corporation, created expressly — created exclusively for the public interest." He seized upon the words of the charter describing one of the King's aims as being "that the best means of education be established in our Province of New Hampshire for the benefit of said Province." This, he declared, was proof that the College was created "for the benefit of the whole people of the Province of New Hampshire." Equating the College to a parish or a town, Sullivan argued that it possessed all the essential qualities of a public corporation subject to the legislature's right "to alter and amend its charter." But even assuming it was a private corporation, said Sullivan, the legislature had a right to alter it "when the public good requires it." His argument was that the acts of the legislature constituted an exercise of the right of eminent domain. "It would be easy to multiply instances in which the legislature of this State, and those of other states, have limited the powers and taken the rights of private corporations when required by the welfare of the community." Sullivan also denied that the charter constituted a contract, but argued that, even if it be considered a contract, it was not the kind of contract which the pertinent provision of the Federal Constitution was designed to protect. The Constitutional prohibition, he correctly pointed out, arose out of a desire to prevent states from enacting laws enabling debtors to pay debts in depreciated paper or personal property other than money.

Anyway, said Sullivan, the legislation did not destroy the old corporation. There was merely a change in the name, but the corporation retained the rights and privileges which belonged to it before. Moreover, the New Hampshire constitution, concluded Sullivan, expressly charged the legislature with a concern for the education of the people of the State, and Dartmouth College "being a mere instrument to effect these objects, it was both the right and the duty of the legislature to alter and amend the charter in such a manner, as would in their judgment be best calculated to obtain them."

Jeremiah Smith next took up the argument for the Trustees. His presentation later covered 38 printed pages. He denied that the College had been improved by the new laws; the contrary in fact was the case as he demonstrated by witty jibes at some of the provisions. But these considerations were irrelevant, he reminded the Court, because what was at issue was the *power* of the legislature to make the alterations without the Trustees' consent. The Trustees were the constituent members of the corporation, and increasing or diminishing their numbers essentially altered the corporation's makeup. So did the removal of their self-perpetuating power; so did other provisions of the act which "made a new constitution for this seminary." The Charter Trustees were an eleemosynary corporation, holding property dedicated to charitable uses, not a public corporation forming a component of the State like a county, a parish, or a school district. To deny legislative control of this corporation did not put it beyond the reach of the State, for it was well settled that charitable corporations were subject to the judicial department of the government which would not only protect their rights but enforce the performance of their duties. Legislative control over eleemosynary corporations can be no greater than over private persons, argued Judge Smith in calling attention to the New Hampshire constitutional requirement that no person be deprived of his property or privileges but "by the judgment of his peers, or the law of the land." The "law of the land" surely means, said Smith, "the same law which governs persons in general and not a statute . . . which itself inflicts the injury." In short, the New Hampshire constitutional requirement, in effect, called for "due process"; and the legislature's acts could not qualify.

Jeremiah Smith heaped scorn on the legislature in the usurped role of the courts, a stance safe enough before the judicial branch of the government:

> No body of men can be imagined every way worse qualified for the exercise of the powers now claimed for the legislature. . . . While I entertain the highest respect for the legislature *as legislature*, I have no hesitation in saying that *as judges* they are as bad as the lot of humanity can possible admit. . . . Private property and character would be altogether unsafe in such hands. . . . If there is anything established by our constitution it is that the legislative department of our government should abstain from the exercise of judicial power as every way totally incompetent to the task.

Smith's reputation for acid sarcasm was sustained elsewhere in his argument:

> We have heard it gravely stated as a reason for the interference of the legislature in this case that literary institutions are subject to decay; and that the charter of our college was granted under the authority of the British king, and as it emanated from royalty, so it contained . . . principles congenial to monarchy: — one of these is the power of self perpetuation. This last 'monarchial principle' so hostile to the spirit and genius of a free government has been . . . preserved in all the charters of charitable institutions granted by our legislature.

Smith then asked whether it was to be presumed that the legislature was not aware of its own "anti-republican tendency." And caustically he noted that

> . . . it has been intimated that much good would result to this seminary and to the public from *governmental checks* on its officers and affairs. I am not a convert to these opinions. As there is no royal road to science so there is no such republican road. . . . There is . . . something in political men, generally speaking, which unfits them for the management of an academical institution. . . . I do not say that such an alliance is as bad as that between church and state; but it is somewhat like it. I had rather see government stand neuter, content itself with seeing fair play between the friends and patrons of learning and its foes than to take upon itself to prescribe systems of education, elect the professors and officers and regulate the interior of colleges as its caprice may direct.

Having unloaded a generous portion of vinegar, Smith deferred to the young Ichabod Bartlett to conclude the argument for the University. Bartlett was no match for the seasoned advocacy of Jeremiah Mason and Jeremiah Smith. He labored verbosely through thirty pages, demonstrating that he could talk as much, but not as well, as the opposition. Webster closed the argument for the Trustees.

In the absence of a stenographic record, what was printed as the arguments of counsel in the formal report of the New Hampshire trial was in fact a collection of statements drawn up at the urging of Timothy Farrar Jr. long after the original pronouncements. In the case of Webster the text of his argument, as printed in the New Hampshire Reports, is in reality Webster's own version of his argument before the United States Supreme Court, prepared by him some eight months later. Though nothing exists in any form, *ex post facto* or otherwise, of the argument Webster actually delivered before the New Hampshire court, it seems safe to conclude, in view of Webster's letter of September 4 to Mason quoted above, that his thinking on the case was far less developed at the State court hearing in September 1817 than it was at the time of the Washington hearing nearly six months later, and that in consequence the presentation at Exeter was less fulsome than the one in Washington. One may also conclude that Webster's Exeter argument, so far as it went, followed quite closely those of Mason and Smith. He almost certainly employed at Exeter a peroration not unlike the one which so moved his hearers in Washington the following March. This assumption rests upon reports by those who heard the Exeter argument that Webster concluded it with an evocation of Caesar in the Senate House, the same image which recurred in the concluding portion of his United States Supreme Court delivery, described hereafter.

THE New Hampshire Superior Court did not hand down its decision until two months after the Exeter hearing. Chief Justice Richardson read the opinion at the November session held at Plymouth.

As Governor Plumer had confidently expected, and other University adherents had earnestly hoped, the decision went against the College. Chief Justice Richardson's opinion dealt first with the question whether the College was a private or a public corporation. "Public corporations are those which are created for public purposes and whose property is devoted to the objects for which they are created," declared the Chief Justice. He noted that Dartmouth College was created for the purpose of "spreading the knowledge of the great Redeemer" among the savages and for furnishing "the best means of education" to the Province of New Hampshire. He deduced that "these great purposes are surely, if anything can be, matters of public concern." Once the Richardson opinion reached the pivotal conclusion that Dartmouth College was a public corporation, as the University counsel had contended and the College counsel denied, the balance of the findings against the College followed logically upon this premise. By definition the Trustees, individually or corporately, had no private rights to be infringed, so according to the opinion's reasoning it was immaterial that the State constitution protected the property and immunities of private corporations and private individuals. On the issue of whether or not the acts violated the Federal Constitution the opinion denied that the contract clause was "intended to limit the powers of the states in relation to their own public officers and servants. . . . If the charter of a public institution, like that of Dartmouth College, is to be construed as a contract within the intent of the Constitution of the United States it will . . . be difficult to say what powers in relation to their public institutions, if any, are left to the states."

Chief Justice Richardson revealed at least a degree of Republican bias by declaring finally: "I cannot bring myself to believe that it would be consistent with sound policy or ultimately with the true interests of literature itself to place the great public institutions, in which all the young men destined for the liberal professions are to be educated, within the absolute control of a few individuals, and out of the control of the sovereign power. . . . The education of the rising generation is a matter of highest public concern and is worthy of the best attention of every legislature. . . . But make the trustees independent and they will ultimately forget that their office is a public trust — will at length consider these institutions as their own — will overlook the great purposes for which their powers were originally given, and will exercise them only to gratify their own private views and wishes, or to promote the narrow purposes of a sect or a party." Whatever may have been Chief Justice Richardson's eminence in the law (and dispassionate legal scholars have given him generally much respect), his competence as a soothsayer was of a lesser order.

Adherents of the College Trustees were not unprepared for the adverse decision. There had been cynical forecasts that only one outcome was to be expected from "Plumer's court." Webster himself, in the privacy of his correspondence, had remarked that it would be odd if the Plumer-appointed court did not enforce "his laws," and in a letter to Francis Brown, a week after the decision was rendered, Webster wrote, "For my part I never expected anything else." Yet Richardson's opinion contains not the slightest suggestion that it lacked judicial integrity. It was only natural that it should have been colored by Jeffersonian doctrines cherished by the Chief Justice, and, for that matter, by the majority of the State's voters. No one today would contend that a reverse bias had not had its effect on the later United States Supreme Court decision in the case. Yet given the predictable philosophical slant of the New Hampshire judges, one questions the wisdom of the earlier advice to the Trustees, both from their own lawyer members and from Jeremiah Smith and Daniel Webster, to bring suit in the State court instead of at once contriving a suit in the Federal Circuit court. The rationale behind such advice was that a by-passing of the State court risked putting the College Trustees in a worse light with Republican-dominated opinion than that in which they had already been placed by the hue and cry arising from John Wheelock's *Sketches*. From the security of hindsight, the risk of alienating a larger segment of public opinion seems to have been less than the risk of an unfavorable decision in the State court.

Though not unexpected, the decision was a blow to College morale in Hanover, and a signal to the University adherents to take a more assertive stance. The climate was converted from one of adjustment to one of rigidity. A student in the College, writing early in the new fall term just before the decision had been rendered, observed that "the University officers have attended the two public lectures. And a circumstance worthy of notice is that when Presidt B. enters the lecture room, the students rise instantly but when Prest Allen comes they stick to their seats like clods, not a person rises, tho his own pupils are present. Two College students in obedience to their father, but much against their own feelings, have gone to the University, two have entered as freshmen, and their whole number I believe to be thirteen [a contem-

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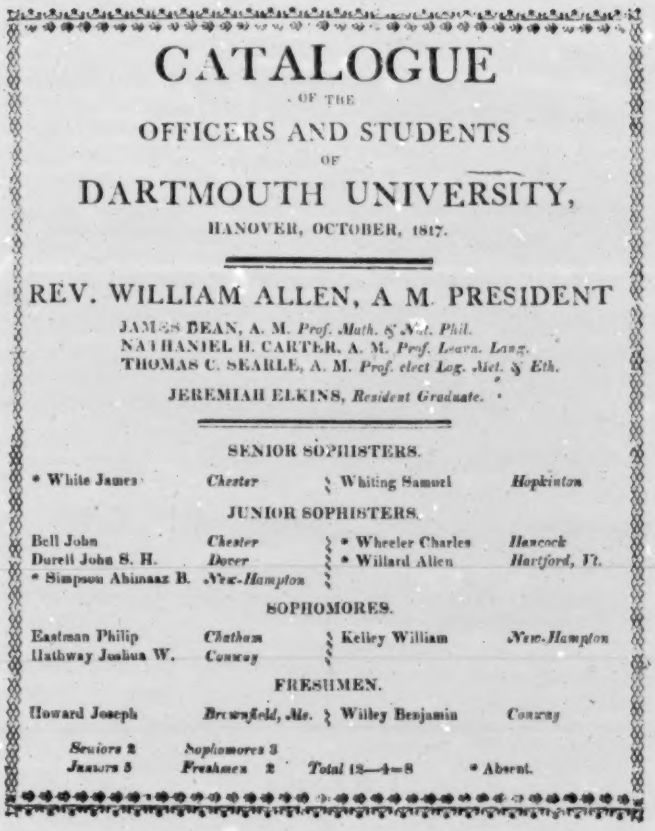
porary University notation dated September 1817 lists 8 students as joining the University that fall — 2 Seniors, 3 Sophomores and 3 Freshmen]. . . . How things are altered. The government indeed appears like the same dignified men, but seem not at home. When I see the two sets of officers in the lecture room (am I correct or is it fancy) I seem to behold in the countenances of one a manly independence, self approbation, perseverance and intrinsic merit; on the other hand, envious inferiority, self distrust, hesitating trepidation and a fear of approaching ill." Though carried away by his own cataloguing, the writer described an institutional atmosphere which, if tense, was yet free of violence.

But the judgment of the New Hampshire court subtly and quickly produced a transformation. A few days after its delivery Rufus Choate wrote to his brother that ". . . the distance between the students of the two institutions at this place is most unpleasantly widened. . . . It is impossible to sit down cooly and composedly to books, when you are alarmed every minute by a report that the library is in danger or that a mob is about collecting or perhaps that we are all to be fined and imprisoned. . . . Even when such reports are entitled to no credit whatever it takes some time to hear them, and also some more to point out their absurdity so that much time on the whole is absolutely wasted." From this agitated scene President Allen, in an open letter addressed to "the Parents and Friends of the Students, late members of Dartmouth College," reported the New Hampshire court's conclusions and criticized the College officers' continued non-observance of the legislative acts. "They still encourage in their pupils," said Allen, "the same confident hopes which have heretofore proved delusive. That they should have influence over the minds of the young gentlemen committed to them is the natural consequence of the relation of students to their instructors; and in times of violent excitement such influence is usually increased and strengthened." But, Allen lamented, the College teachers were "exerting their influence erroneously and in a manner prejudicial to the literary and moral improvement of their pupils as well as injurious to the peace of the University." He concluded his message to parents by advising them to see that their sons join "the legal seminary at Hanover" or withdraw to some other college.

Violence was not long to be repressed. On November 11, word reached University officers that the books belonging to the libraries of the two student literary societies were being "taken from their shelves and boxed for the purpose probably of being removed from college this night." Instantly the University officers directed their inspector of buildings "to take possession of the rooms in which are deposited the Libraries of the Societies of the Social Friends and of the United Fraternity and to secure the doors of them with proper fastness." This touched off a melee that rocked the Hanover plain.

An observer, then a College sophomore, described the episode in a letter to a friend:

> My pen blushes at the thought of rehearsing the outrages of last evening. About 7 of the clock . . . a mob of the more vicious and indecent, headed by Profs. Dean and Carter [of the University] and Mr. Hutchinson [the University's inspector of buildings] made an outrageous attempt upon the Social Friends Library. While some of the mob was demolishing the door with an ax these three gentlemen stood in silent admiration of the heroic deed. Fortunately the noise reached the ears of the Fraternity which was assembled in society hall. No sooner was the uproar heard than they were at the library door. By this time it was wholly demolished and an entrance into the Library effected. Every student of the College, with some friends, was by this time in his post. The aggregate number of students and friends, as nigh as I could judge, was about one hundred and fifty; that of the mob about twenty. You will quickly perceive that they were completely in our power; and it was the determination to break the first man's head who attempted to get out of the room. They were to continue in this situation for about ½ hour when the students thought it advisable to transfer them to an adjoining room. They were conducted, one by one, through the crowd of students having their clubs elevated. . . . In this situation we kept them another ½ hour wholly ignorant of their future destiny and agitated with cruel fears. After this they were conducted down stairs which was lined each side with a row of students having their clubs elevated . . . and conducted to their lodgings. All this was done with less disturbance than one would naturally [expect] from the enraged condition of every student and friend of justice and good order. The fellows themselves even say that they were treated more generously than they could have expected.



CATALOGUE

OF THE

OFFICERS AND STUDENTS

OF

DARTMOUTH UNIVERSITY,

HANOVER, OCTOBER, 1817.

REV. WILLIAM ALLEN, A M. PRESIDENT

JAMES DEAN, A. M. *Prof. Math. & Nat. Phil.*
NATHANIEL H. CARTER, A. M. *Prof. Learn. Lang.*
THOMAS C. SEARLE, A. M. *Prof. elect Log. Met. & Eth.*

JEREMIAH ELKINS, *Resident Graduate.*

SENIOR SOPHISTERS.

* White James	*Chester*	Whiting Samuel	*Hopkinton*

JUNIOR SOPHISTERS.

Bell John	*Chester*	* Wheeler Charles	*Hancock*
Durell John S. H.	*Dover*	* Willard Allen	*Hartford, Vt.*
* Simpson Ahimaaz B.	*New-Hampton*		

SOPHOMORES.

Eastman Philip	*Chatham*	Kelley William	*New-Hampton*
Hathway Joshua W.	*Conway*		

FRESHMEN.

Howard Joseph	*Brownfield, Me.*	Willey Benjamin	*Conway*

Seniors 2 *Sophomores* 3
Juniors 3 *Freshmen* 2 *Total* 13—4=8 * Absent.

October 1817 roster of University faculty and students.

This observer's account is corroborated by strikingly similar descriptions on the part of other students, including the officers of the Literary Societies of whom Rufus Choate was one.

Meanwhile, the College Trustees, in accord with their promise to President Brown, prepared to have their case carried to the Federal Supreme Court. Such a move struck Governor Plumer as foolhardy. "I should think they would not adopt such a course had I not seen too many instances of men suffering passion, wounded pride and sentiment to usurp the place of solid discretion and mature judgment. I think they can have no rational ground to hope for success in the national court, and that the friends of the University have

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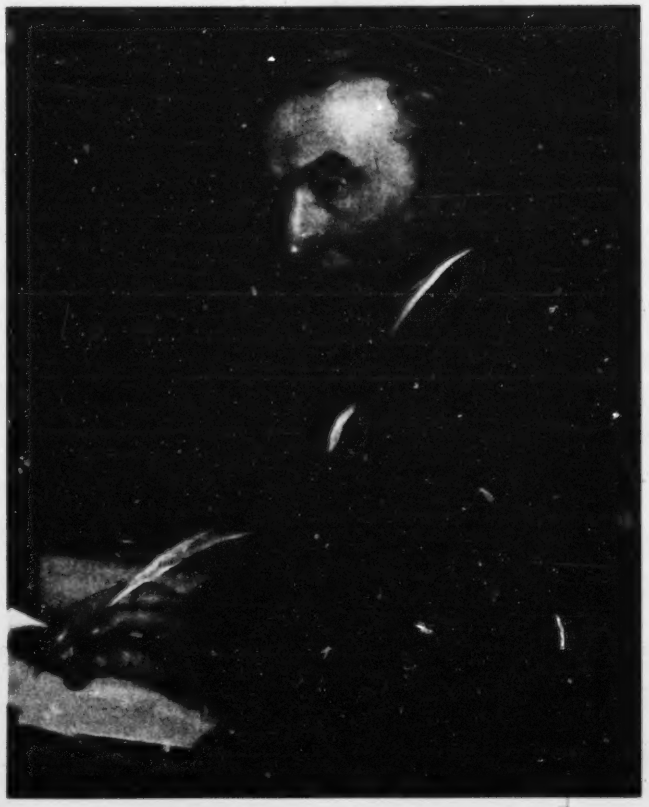
nothing to fear from the result, but the expense and the evils which proceed from a state of suspense."

Referring to a conversation he had just had with Senator Thompson in Boston, Webster on November 15 wrote to Francis Brown saying, "I have thought it probable you would wish my attention to the cause at Washington." Webster could, he said,

> determine by the 25th or 30th of this month whether I shall go to Washington this winter or not and this decision will depend in a great measure on what may be wished in relation to this cause. I have no other great occasion to go, and you will judge whether it will be better that I should go *principally on* this account, or whether better service cannot probably be had at a cheaper rate. I should chuse to associate with me some distinguished counsel. Mr. Thompson and myself have mentioned Mr. Hopkinson of Philadelphia. He is well known to us and I think him capable of arguing the cause as well as any man in the United States.
>
> I am aware that there must be great difficulty in obtaining funds on this occasion. I wish you therefore to write me very plainly what can be done and what cannot, and I will give you my advice as plainly in return. I think I would undertake for a thousand dollars to go to Washington and argue the cause and get Mr. Hopkinson's assistance also. I doubt whether I could do it for a much less sum. Mr. Hopkinson will be very competent to argue it alone and probably would do so for something less, though no counsel of the first rank would undertake this cause at Washington probably under six or seven hundred dollars. . . . There is no cost of any consequence in carrying the cause to W. except counsels fees.



Joseph Hopkinson, portrait by Thomas Sully.

Webster, without waiting for Brown's reply to this letter, sounded out Hopkinson as to his willingness to join with him in arguing the College case. Hopkinson readily consented. Aristocrat, patron of the arts, author of "Hail Columbia," Joseph Hopkinson had started life simultaneously with Dartmouth College, having been born in 1770. A native of Philadelphia and a graduate of the University of Pennsylvania, he had distinguished himself in the law at an early age. He was serving as Federalist Member of Congress from Pennsylvania when enlisted by Webster.

After consultation with Thompson and Marsh, President Brown wrote to urge Webster to represent the Trustees before the Supreme Court. Though anxious to secure Webster's services, Marsh had cannily observed that Webster was likely to go to Washington in the winter "whether we engage him to go or not," and indicated he did "not feel well pleased that [Webster] should place the question on that issue." Marsh's deduction was correct for it turned out that Webster had other cases requiring his presence in Washington for the February term of court. Marsh further commented that "if we have to pay the $1000 . . . I shall not shrink from any share of the burden which my friends think I ought to bear. . . ." It was Marsh's view that Webster was "more likely to get a decision at the next term and will be better prepared for the argument than anyone else whom we can employ except it may be Judge Smith or Mr. Mason." The latter two had ruled themselves out, being unable or unwilling to make the long journey to Washington.

Webster agreed on November 27 to take the case and informed Brown he had already approached Hopkinson "from the fear he might be written to on the other side as I knew Gov. Plumer . . . had a great opinion of his professional talents." Webster announced that he would seek at once a properly certified record of the case in the New Hampshire court, so as to enter it as soon as possible on the Supreme Court docket, and on the same day wrote to Mason to secure it. Webster also notified Mason that he would need, as soon as possible, Mason's and Judge Smith's briefs of their arguments before the State court, as well as a copy of the opinion of that court.

When by the end of the first week in December Webster had not received the briefs he became anxious and again pointed out to Mason and Smith his dependence upon them. To Mason he said, "Everybody will expect me . . . to deliver the Exeter argument. Therefore the Exeter argument must be drawn out before I go. . . . We must have Richardson's opinion a little before hand . . . that we may consider its weak points if there be any." And to Smith on the same day he wrote, with his customary deference to that distinguished elder lawyer, "Every one knows I can only be the reciter of the argument made by you at Exeter."

It had earlier been understood by the counsel on both sides that if the case were appealed to the United States Supreme Court they would agree among themselves on a written statement of facts in the form of a "special verdict." With the help of President Brown on College history, and under his gentle prodding, Judge Smith and Mason worked out the text of the "special verdict" and succeeded in obtaining its acceptance by Sullivan and Bartlett.

Webster had noted in his letter to President Brown accepting the Washington assignment that he would expect to receive the agreed fee by January 15, the date which Brown had seemingly proposed for payment. Both President Brown and Thomas Thompson were hopeful that some financial assistance would be forthcoming at this juncture from sister educational institutions. It seemed to Thompson that Yale College had "as great a stake in the controversy as anyone, and perhaps as likely to meet with the same troubles." Harvard also was thought of as a source of aid. Despite appeals, neither institution came to the rescue of Dartmouth College.

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Any temptation to be censorious should be balanced by reflection whether the Dartmouth Trustees, had the shoe been on the other foot, might not have similarly held back. Such donations were probably beyond the scope of all such institutions at that time. Another reason, less worthily offered as an explanation for restraint on the part of the Harvard community, was reported by a friend of the College seeking contributions in Cambridge. Some preferred, he said, that the case would not be appealed to the Federal Supreme Court because that court "would probably confirm the present [New Hampshire] decision and thereby increase a hundredfold the weight of its authority. . . . The result of a hearing at Washington would be worse than leaving the cause where it is, so far at least as respects [institutions in other states], the authority of the [New Hampshire] decision . . . being so inconsiderable."

THE two Presidents of College and University undertook to cover what today is known as "the alumni circuit," each endeavoring to raise funds to pay for his institution's respective counsel. Brown had considerable success in this at Boston. A special meeting of the Boston alumni had been called for the purpose. A few days later when Thompson encountered him in Portsmouth he found Brown "in high spirits," both from the success of his fund gathering and from the favorable public sentiment toward the College.

President Allen appears to have been in Portsmouth simultaneously and for an identical purpose. At this period the University seems to have been more desperate for funds than the College, uneasy as was the state of the latter. The legislature, having begat the University, was bent on looking the other way when financial claims based on its paternity were pressed. Governor Plumer, too, backed away. He wrote to a friend that "considering my peculiar situation . . . it would be improper for me as an individual to advance or promise any money for [University counsel] fees. It would cause our political enemies to blaspheme."

President Brown engineered another piece of year-end business in the College's cause. Benjamin Gilbert, Hanover lawyer and supporter and confidant of Brown, had to make a journey on personal matters to Richmond, Va., going by way of Washington and Philadelphia. Brown supplied him with letters, copies of the charter, and other relevant documents on the College, instructing him to put them into suitable hands when the opportunity arose. Included also was a packet for Joseph Hopkinson's use in Washington. Gilbert reported that he came across many people on his journey. "Some," he said, "were inquisitive respecting our troubles. . . . Several remarked that the question the case presents deeply concerned the whole community." But perhaps Gilbert's most useful errand was performed in Richmond when he placed in the hands of a friend of the College a copy of the charter "for the perusal of Chief Justice Marshall." Gilbert reported later that he had satisfied himself after much reflection "that the information the document contained must be acceptable to the Chief Justice and that there could be no impropriety in his having the information, unless the manner of communication should render the motive of giving it suspicious." The friend, who assumed the delivery to Marshall, assured Gilbert that "as soon as the Chief Justice came home from his farm in the country . . . he would wait on [him] and have the documents with him as a neighborly courtesy adopted on his own suggestion." It is of course impossible to know whether this early access to the text of the Dartmouth charter played any part in the readiness with which Marshall later came to see the issues from the College's point of view.

By the first of the year, too, Webster had become genuinely persuaded of the desirability, if not necessity, of mounting another but simultaneous attack on the University. As all counsel were aware, and perhaps Webster most of all, the appeal from the New Hampshire court to the Federal Supreme Court must rest entirely on the narrow and, many believed, dubious points involving the Federal Constitution, namely whether the charter constituted a contract within the meaning of Article I, Section 10, and if so whether the New Hampshire legislation had impaired its obligations. Strict observance of this limitation would preclude, before the Supreme Court, a recital of, much less an argument based on, the several other grounds that had been urged in the state court against the legislation. Consequently Webster concluded that suits should be started by the Trustees at once in the Federal Circuit Court for the district of New Hampshire on which he was well aware Justice Story of the United States Supreme Court would be sitting.

A basis for original jurisdiction in a Federal court was "diversity of citizenship" of the parties. This condition was met if the opposing parties were residents of different states. "Suppose," speculated Webster in a letter to Brown dated December 8, 1817, "the Trustees should . . . *lease* portions of their N. Hamp lands to a citizen of Vermont?" Webster likewise suggested the idea to Mason and Judge Smith. In writing to the latter Webster observed mysteriously that he had "thought of this the more, from hearing of sundry sayings of a great personage." A few sentences later light is thrown on the identity of the "great personage" by Webster's comment that "perhaps the known pendency of such a suit might induce Judge Story,* who fully intends to make the court's opinion in this case, to consider all the questions in the present cause."

ON President Brown's fund-raising trip to Boston, referred to above, he had stopped there with Webster who then urged that a Circuit Court case be started at once. Brown requested Mills Olcott in Hanover to act accordingly, cautioning him that ". . . it is best to say but little on the subject" and observing pointedly (no doubt a paraphrase of Webster's own words): "If a suit should be commenced, the argument will be had of course before *Judge Story* at Exeter in May next."

The College's advisers, Mason and Smith, endorsed Webster's tactic, and — joined this time by Timothy Farrar — struggled with the proper technical procedures to employ in bringing Circuit Court suits.

Meanwhile the cumbersome University machinery was being stirred to action by the unfortunate William Woodward, critically ill as he was. As Secretary of the University

* The name "Smith" rather than "Story" appears here in the printed text of this letter on page 268 of volume 17 of the National Edition of *The Writings and Speeches of Daniel Webster*. It is clear that this is in error. Webster was writing to Judge Smith. Whether the error was a misstatement in the original letter now no longer available, or was made by the editor is not known. It seems certain that Webster used (or intended to use) the name "Story" here; it is consequently supplied. The frequent associations which occurred between Webster and Story, as fellow residents of Massachusetts, could have given occasion for Webster to know of Story's intentions regarding the delivery of an opinion in *Trustees of Dartmouth College v. Woodward.*

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Board he endeavored to schedule a meeting of the University Trustees in December 1817, but was plagued again by the difficulty of obtaining a quorum. He wrote to Plumer calling on him "to devise a plan for resisting the efforts of the ex Trustees to remove our cause to the Supreme Court of the United States," adding hopefully that "Mr. Hubbard [a lawyer Trustee of the University] . . . is of opinion they will decline taking any jurisdiction over it." The lumbering slowness of the officers and friends of the University in responding to the likelihood of a new challenge before the United States Supreme Court is difficult to comprehend. Plumer, to whom many of them looked, was determinedly unwilling to believe that the old Trustees would appeal the New Hampshire court decision.

The first warning voice the University people heeded was that of Salma Hale. Hale was a New Hampshire Congressman; he was also a Trustee of the University. From Washington he wrote to the incredulous Plumer on December 19 that a respected Hanover visitor had "observed that the college cause would undoubtedly be removed here this winter." Hale added that his fellow Congressman, Joseph Hopkinson, had "mentioned [the case] a day or two ago, and observed that should it be removed here it was not at all probable that it would be *decided* this winter." Hopkinson seemingly did not feel called upon to inform Hale that he had already been retained to assist in arguing the appeal for the College.

It was not until the last day of the year that the University Trustees met to consider what lay before them. With William Allen presiding, the Board asked Messrs. Sullivan and Bartlett to prepare the necessary papers for a trial before the United States Supreme Court. The Board likewise decided to request John Holmes, a Brown University graduate, Maine resident, and a member of Congress, to be their counsel; and, should he decline, to request Congressman Hale to employ other counsel "with the advice of the friends of the University now at Washington." Not only was the step late but it was disastrous, for Holmes, who readily accepted the assignment, proved to be an entirely unsuitable selection. His reputation as a politician was well established, but as a lawyer he was second-rate. Moreover, while the style of his oratory was well suited to the stump it was wholly inappropriate before a court.

Hale did not hesitate to notify Woodward and Allen of his misgivings about Holmes, and it fell to the hapless William Woodward to find reasons to support the Trustees' choice. Actually Woodward had been absent from the Board meeting at which the selection was made. In response to Hale's doubts, Woodward came to Holmes' support by asserting that "what appears at first as forbidding and indeed likely to impress some with disgust wears away on further acquaintance. I have thought him extremely ready, of sound mind, and a good lawyer inferior to D. W. only in point of oratory." William Allen felt it necessary to point out to Hale that the Trustees had "made no other provision for counsel," and moreover that he, Allen, did "not distrust the results of the trial in the hands of Mr. Holmes." But powerful friends of the University in Washington quickly and firmly insisted on additional counsel being retained. William Wirt, U.S. Attorney General, or Thomas Addis Emmett, famous Irish patriot and New York advocate, were the names suggested.

At this point Plumer supported Hale by declaring himself in favor of employing William Wirt to help Holmes. Plumer volunteered that, had he been at the Board meeting at which Holmes was selected, he should "never have thought of resting the defense with one lawyer." Plumer further offered the backhanded comment that he had been confident "many months since" that Holmes' "reputation both as a statesman and orator would not rise by being a member of Congress." This tardily taken position illustrated again a recurring University weakness. University Trustees on whom reliance was placed simply failed to get around to Board meetings. When Hale finally engaged Wirt, Plumer gave assurance that he had "no doubt the Board of Trustees will not only approve the measure but honorably compensate him for his services." William Wirt, native of Switzerland and a resident of Virginia, successfully combined scholarship with the practice of the law. In 1817 President Madison had appointed him Attorney General of the United States. As was then the custom, he carried on a private practice in addition to his official duties. A man of immense personal charm and oratorical gifts, he was said to have had a marked distaste for the drudgeries of the law.

Hale experienced worrisome delay in obtaining from Sullivan and Bartlett, for the use of the University's counsel in Washington, a list of authorities offered in supporting the University's cause before the New Hampshire court, as well as other essential documentation. Copies of Chief Justice Richardson's opinion were also slow in reaching his hands. When the latter arrived he distributed copies among "the gentlemen of the bar" and was rewarded by at least one of them observing that the Richardson opinion was "unanswerable." Hale needed all the cheer he could extract.

Congressman Hale's task in Washington would have been easier if Woodward's health had permitted his taking a more active part on the home scene. Woodward was the only lawyer in Hanover concerned with University problems and had he been well he might have played a role for the University comparable to that of Olcott or Marsh or Thompson for the College. Allen too was of no great help to Hale. He heard only the views which supported the University. His overconfidence was massive and allowed no room for the kind of doubt that would have made for hard-headed appraisal and constructive effort to improve the cause with which he was himself linked. He was so beset with the mistaken notion that the College was seeking delay in bringing the case to trial in Washington that he was determined to rush the University into court, though his own forces were only partially mustered and wholly unprepared.

TIME was running out. On February 14, 1818 Webster wrote to Brown that the case was so early on the docket that he had no doubt it would be argued in the current term. He again urged Brown to see that the Circuit Court cases were started promptly, adding that should it become necessary he would say to the Supreme Court "that such actions are either brought or contemplated." Webster found the case attracting much attention in Washington, at least in the circles in which he moved. He had just received the official text of the New Hampshire Superior Court opinion and volunteered to Brown that he found it "not quite so formidable"

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as he had expected. He added reassuringly, "I shall keep you informed of all material occurrences."

As February expired Hale sent disquieting news to William Allen. Hale had just called on Wirt but was unable to see him "as ill health confined him to his bed." Hale observed that "that may defer the trial a day or two — I think not more." He also reported that Holmes had voiced some doubts, his own or others, about a successful outcome of the case. Hale hastened to assure Allen that he did not share such doubts, and that all to whom he had showed the New Hampshire opinion "pronounce it very able and most unanswerable." Yet for the first time Hale's confidence seemed somewhat shaken.

Governor Plumer, on the other hand, remained parochially unperturbed. On the final day of February he wrote Hale that "the opinion of our [New Hampshire] court reflects much credit, not only on them, but on the State where it was pronounced. I have no doubt that opinion will be confirmed by the Supreme Court of the nation." Plumer was so incautious as to predict that the Supreme Court would pronounce judgment at once "as the law is too clear to require the court to adjourn for advisement."

THE case of *Trustees of Dartmouth College vs. William H. Woodward* was called for trial before the Supreme Court of the United States on Tuesday, March 10, 1818. Present were Daniel Webster and Joseph Hopkinson for the plaintiffs, and William Wirt and John Holmes for the defendants. Presiding was Chief Justice John Marshall, then aged 63. Appointed as Chief Justice in 1801 by President John Adams, he had become an immense force in the shaping of American constitutional law and theory.

Associate Justices sitting were:

Bushrod Washington, 55 years old, a native of Virginia, a former student at William and Mary, and nephew of George Washington. Federalist in sympathies, he had been appointed by John Adams in 1798.

William Johnson, 47 years of age, a South Carolinian and a Princeton graduate. His leaning was toward Federalist views though he had been appointed by Thomas Jefferson in 1804.

Brockholst Livingston, aged 61, a Princeton graduate and a New York resident. Anti-Federalist and pro-Jefferson in his views, he had been appointed in 1806.

Thomas Todd, aged 53, native of Virginia and, as a resident of Kentucky, the only "westerner" on the court. Appointed by Jefferson in 1807, he shared Jefferson's political faith but tended to side with Marshall on constitutional questions.

Gabriel Duvall, aged 66, native of Maryland which he had represented in Congress as a Republican. He had been appointed by James Madison in 1811.

Joseph Story, aged 39, a Harvard graduate and a resident of Massachusetts where he was a Republican in a Federalist world. At age 32 he was appointed by Madison in 1811 as the youngest justice to serve on the Supreme Court. Next to Marshall, Story became the most distinguished member of that bench by the time of his death in 1845.

Late in the morning of the assigned day, Daniel Webster began his argument before the court. Today, a century and a half later, an impression is sometimes encountered, beyond as well as within the Dartmouth College family, that Webster's presentation consisted largely of informing the court that Dartmouth was a small college but that there were those who loved it. In fact the arguments of counsel consumed three days, and résumés of them occupy more than seventy pages in the official record.

As he had declared he would, Webster followed in general the pattern of the Smith and Mason arguments at Exeter. He first persuasively developed the thesis that, contrary to the holding of the New Hampshire court, the College was a private eleemosynary corporation under the charter, and that as a private corporation ("The Trustees of Dartmouth College") it possessed the same rights as a private individual. He then carried his presentation through all three propositions covered at Exeter. In summary, these were that the acts of the New Hampshire legislature were invalid and not binding upon the Trustees without their consent because they were: (1) "against common right" (an attempt by the legislature to exercise powers reserved to the judiciary in a free government); (2) "against . . . the Constitution of New Hampshire" (an attempt by the legislature, contrary to Article 15 of the State Constitution, to deprive the corporation of "property, immunities, or privileges . . . but by judgment of his peers or the law of the land"); and (3) "repugnant to the Constitution of the United States" (the charter was a contract and the New Hampshire acts impaired its obligation within the meaning of Section 10, Article I).

Only the third point was properly before the United States Supreme Court. Webster blandly justified to the court his coverage of the other two propositions on the ground that "it may assist in forming an opinion of the true nature" of the legislative acts. The Chief Justice made no attempt to restrain him.

Webster was followed by John Holmes who argued that the Constitutional proscription against contract impairment did not extend to the internal government of a state, and that as the charter had created a public corporation no contract within the meaning of the Federal Constitution was present. In any case a charter granted by the King "necessarily became subject to the modification of a republican legislature." The passage of fifty years without a challenge of the charter provisions did not "infer an acquiescence on the part of the legislature or a renunciation of its right to abolish or reform" the charter. Even if the charter were deemed a contract protected by the Federal Constitution its obligations were not "impaired," in Holmes' view, as the acts in reality improved the institution.

Wirt, who followed Holmes, recognized the limited Constitutional question before the court. This was a charter to a public corporation, urged Wirt, and therefore necessarily subject to legislative discretion. The contract clause in the Federal Constitution was never intended to extend to a state's exercise of that discretion. Inadequately briefed by University strategists in Washington, Wirt, without supporting data, charged that Eleazar Wheelock was not the founder of the College. Webster was able to confound him by an immediate reference to the charter preamble which described Wheelock as "founder." On firmer ground, Wirt argued that Wheelock had not contributed any funds to the College. "The state has been a contributor of funds," he said. "It is therefore not a private charity but a public institution; subject to be modified, altered, and regulated by the supreme power of the state." Like Holmes, Wirt took the position that the "charter was destroyed by the revolution. . . . If those who were trustees carried on the duties after the revolution, it must have been subject to the power of the people. . . . These civil institutions must be modified and adopted to the mutations

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of society and manners. They belong to the people — are established for their benefit — and ought to be subject to their authority."

Hopkinson, for the College, followed with a reply to Wirt in which he pointed out that the whole argument made against the College rested on the erroneous assumption that the corporation created by the charter was "a public corporation" and "its members . . . public officers or agents of the government." He protested that "the defendant, taking at once for granted everything that is disputed, makes his progress to the end of his case without . . . obstruction." In effect the burden of opposing counsel's argument, according to Hopkinson, was "that all education is necessarily and exclusively the business of the state."

> It is true that a college in a popular sense is a public institution because its uses are public, and its benefits may be enjoyed by all who choose to enjoy them. But in a legal and technical sense they are not public institutions but private charities. Corporations may therefore be very well said to be for public use, of which the property and privileges are yet private. . . . If the property of this corporation be public property, that is, property belonging to the state, when did it become so? It was once private property; when was it surrendered to the public? The object in obtaining the Charter was not surely to transfer the property to the public but to secure it forever in the hands of those with whom the original owners saw fit to entrust it. Whence then that right of ownership and control over this property which the legislature of New Hampshire has undertaken to exercise?

Hopkinson endeavored to spell out the elements of a contract: "In consideration that the founder would devote his property to the purposes beneficial to the public the government has solemnly covenanted with him to secure the administration of that property in the hands of trustees appointed by the charter. . . . There are rights and duties on both sides. The charter was a grant of valuable powers and privileges. The state now claims the right of revoking this grant without restoring the consideration which it received for making the grant. Such a pretense may suit a sovereign power. . . . But it cannot prevail in the United States where power is restrained by constitutional barriers and where no legislature, even in theory, is invested with all sovereign powers."

Hopkinson brushed aside, as irrelevant, all ambiguities as to Eleazar Wheelock's founding and donative roles, and as to which other donors had participated: "The foundation was still private and whether Dr. Wheelock, or Lord Dartmouth, or any other person possessed the greatest share of merit in establishing the college, the result is the same so far as it bears on the present question. Whoever was founder, the visitorial power was assigned to the trustees by the charter and it is therefore of no importance whether the founder was one individual or another."

Hopkinson concluded the presentation of the case by heaping scorn on Holmes' endeavor to tie royal trappings onto the College Trustees, and to make them out as tainted with monarchial proclivities, merely because they existed under a charter granted by a King. The doctrine, offered by Holmes and Wirt, that the Revolution dissolved all prior charters was likewise the target of Hopkinson's eloquence. "In what dream of insanity did this monstrous idea engender itself? . . . No decision or suggestion of any tribunal in our country, legislative or judicial . . . warrants . . . this most wild and pernicious pretension."

More lively than the official record of the arguments were informal comments made about them by observers at the trial. Best known are the observations of Chauncey A. Goodrich, then Professor of Oratory at Yale College. Professor Goodrich had been directed by his institution to attend the trial, for such value as the experience might have in case Yale found itself facing a similar problem. His celebrated account of Webster's argument was not in fact set down until 1853, and only then at the request of Rufus Choate expressly for the latter's use in a eulogy of Webster who had died the preceding year. One suspects that Goodrich, conscious of the generosity traditionally prescribed for eulogies, did not stint his description of Webster's performance. It is doubtful, too, that the drama had been allowed to suffer any diminution during the intervening thirty-five years as Goodrich described it to his classes in oratory. Though the Goodrich account has often appeared in print no exposition of the Dartmouth College Case would be complete without its recital:

> Mr. Webster entered upon his argument in the calm tone of easy and dignified conversation. His matter was so completely at his command that he scarcely looked at his brief, but went on for more than four hours with a statement so luminous, and a chain of reasoning so easy to be understood, and yet approaching so nearly to absolute demonstration, that he seemed to carry with him every man of his audience, without the slightest effort or uneasiness on either side. It was hardly *eloquence*, in the strict sense of the term: it was pure reason. Now and then for a sentence or two his eye flashed and his voice swelled into a bolder note, as he uttered some emphatic thought, but he instantly fell back into the tone of earnest conversation, which ran throughout the great body of his speech. A single circumstance will show the clearness and absorbing power of his argument. I observed Judge Story sit, pen in hand, as if to take notes. Hour after hour I saw him fixed in the same attitude; but I could not discover that he made a single note. The argument ended, Mr. Webster stood for some moments silent before the court while every eye was fixed intently upon him. At length, addressing Chief Justice Marshall, he said, —
>
> "*This, sir, is my case.* It is the case, not merely of that humble institution, it is the case of every college in our land. It is more. It is the case of every eleemosynary institution throughout our country, of all those great charities founded by the piety of our ancestors to alleviate human misery, and scatter blessings along the pathway of human life. It is more. It is, in some sense, the case of every man who has property of which he may be stripped, — for the question is simply this: Shall our state legislature be allowed to take that which is not their own, to turn it from its original use, and apply it to such ends or purposes as they, in their discretion, shall see fit? Sir, you may destroy this little institution: it is weak; it is in your hands! I know it is one of the lesser lights in the literary horizon of our country. You may put it out: but if you do, you must carry through your work! You must extinguish, one after another all those great lights of science, which, for more than a century, have thrown their radiance over the land! It is sir, as I have said, a small college, and yet *there are those that love it*. . . ."
>
> Here the feelings which he had thus far succeeded in keeping down, broke forth. His lips quivered; his firm cheeks trembled with emotion; his eyes were filled with tears; his voice choked, and he seemed struggling to the utmost, simply to gain the mastery over himself which might save him from an unmanly burst of feeling. I will not attempt to give you the few broken words of tenderness in which he went on to speak of his attachment to the college. The whole seemed to be mingled with the recollections of father, mother, brother, and all the privations through which he had made his way into life. Every one saw that it was wholly unpremeditated, — a pressure on his heart which sought relief in words and tears.
>
> The court-room during these two or three minutes presented an extraordinary spectacle. Chief Justice Marshall, with his tall, gaunt figure bent over as if to catch the slightest whisper, the deep furrows of his cheek expanded with emotion, and eyes suffused with tears; Mr. Justice Washington at his side, with his small emaciated frame, and countenance more like marble than I ever saw on any other human being, leaning forward with an eager, troubled look;

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and the remainder of the court at the two extremities, pressing, as it were, toward a single point, while the audience below were wrapping themselves round in closer folds beneath the bench to catch each look, and every movement of the speaker's face. . . . There was not one among the strong-minded men of that assembly who could think it unmanly to weep, when he saw standing before him the man who had made such an argument melted into the tenderness of a child.

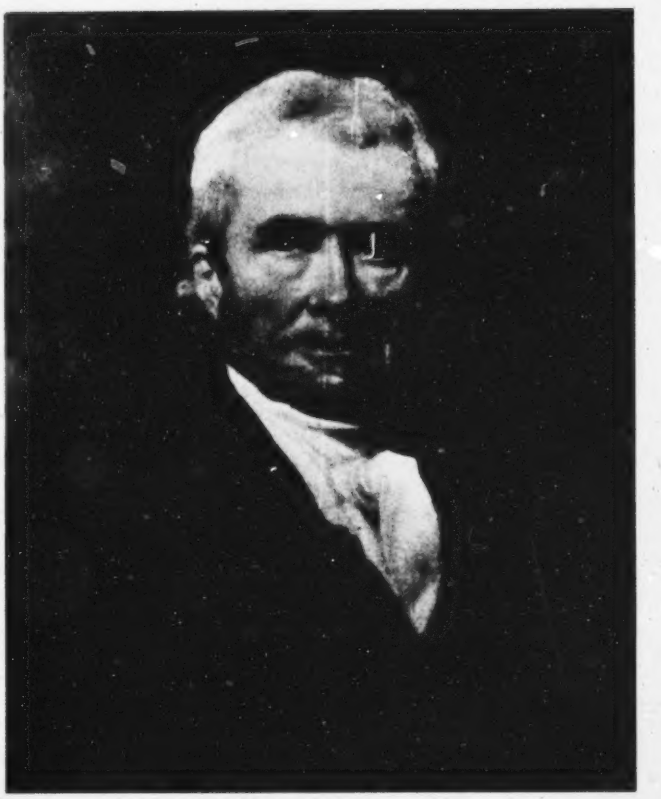
Mr. Webster having recovered his composure, and fixing his keen eye on the Chief Justice, said, in that deep tone with which he sometimes thrilled the heart of an audience, —

"Sir, I know not how others may feel (glancing at the opponents of the college before him, some of whom were its graduates), but, for myself, when I see my alma mater surrounded, like Caesar in the senate house, by those who are reiterating stab upon stab, I would not, for this right hand, have her turn to me and say, — *et tu quoque mi fili! — 'and thou, too, my son.'* "

He sat down: there was a death-like stillness throughout the room for some moments: every one seemed to be slowly recovering himself, and coming gradually back to his ordinary range of thought and feeling.

In a letter to Judge Smith sent immediately after the trial Webster himself provided a more matter-of-fact account of his presentation. He wrote:

I opened the case with most of the principles and authorities on which we relied at Exeter. Your notes I found to contain the whole matter. They saved me great labor; but that was not the best part of their service; they put me on the right path, and conduct, as I think, to an irresistible conclusion. On some points of the case, I have varied my views a little. The rogues here in Congress complain that the cause was put on grounds not stated in the court below. There is little or nothing in this. . . . The only new aspect . . . was produced by going into cases to prove . . . ideas which indeed lie at the very bottom of your argument.



Chief Justice John Marshall

But others, if not such gifted raconteurs as Goodrich, were also disinclined to underplay Webster's role. "Webster's argument was said to be the ablest ever delivered in this Court," wrote Eleazar Wheelock Ripley to his cousin, William Allen, in Hanover. Ripley, a New Orleans lawyer and a grandson of Eleazar Wheelock, happened to be in Washington, though he did not attend the trial. His report to Allen was not encouraging: "A friend of ours after hearing [Webster's argument] observed to me 'I am afraid you have lost your cause.' " Even Salma Hale grudgingly conceded Webster had "made no little impression . . . was powerful . . . very able. . . ."

Regardless of where their sympathies lay, all united in the view that John Holmes' performance had been dismal. Webster described it in a letter to Mason as "three hours of the merest stuff that was ever uttered in a county court." To Judge Smith Webster wrote that "Holmes did not make a figure. I had a malicious joy in seeing Bell* sit by to hear him, while everybody was grinning at the folly he uttered. Bell could not stand it. He seized his hat and went off."

Salma Hale was more restrained in his comments: "Mr. Holmes was below our moderate expectations." But Ripley was less temperate. To William Allen he wrote: "Holmes ranks low at this Bar. . . . If you have lost the case you may attribute [it] entirely to your improvidence in arranging counsel."

William Wirt, on the other hand, received warm approval from Salma Hale who, after all, had recruited him. During the trial Hale wrote to Allen, "The employment of Mr. Wirt seems every day more correct." Hale's admiration for Wirt's "very able argument" led him, quite unnecessarily to feel concern for what Webster might suffer in consequence. And to Plumer, Hale wrote of Wirt's "mind of a giant," and added from the depth of his delusion that it had "made Webster lower his crest and sit uneasy."

Actually Wirt was at a painful disadvantage in the case. He had been so preoccupied with his duties as Attorney General that he had not been able to prepare his argument carefully. Exhausted, and conscious of the inadequacy of his preparation, he felt impelled in the middle of his presentation to ask the court for a brief recess until he gathered himself and his thoughts together.

Webster too spoke well of Wirt but not of his performance in this trial. "[Wirt] is a man of talents, and will no doubt make the best of his case," wrote Webster to President Brown before Wirt's argument had begun. But after Wirt had spoken Webster observed to Jeremiah Mason: "[Wirt] is a good deal of a lawyer, and has very quick perceptions, and

a handsome power of argument; but he seemed to treat this case as if his side could furnish nothing but declamation. He undertook to make out one legal point on which he rested his argument, namely, that Dr. Wheelock was not the founder. In this he was, I thought, completely unsuccessful. He abandoned his first point, recited some foolish opinions of Virginians on the third, but made his great effort to support the second, namely that there was no contract. On this he had nothing new to say. . . . He made an apology for himself, that he had not had time to study the case, and had hardly thought of it, till it was called on."

To Judge Smith, Webster commented, "Wirt has talents,

* New Hampshire Superior Court Justice who, four months before, had participated in the decision against the College, and who was in Washington to attend a Supreme Court hearing in a suit to which he was himself a party, and in which Webster represented him.

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is a competent lawyer, and argues a good cause well. In this case he said more nonsensical things than became him."

Webster was full of praise for his associate counsel, Joseph Hopkinson who, he wrote to President Brown, "has entered into this case with great zeal." After Hopkinson's reply to Wirt, Webster described it as "very gratifying and satisfactory to me. . . . Mr. Hopkinson understood every part of the cause, and his argument did it great justice." To Mason, Webster wrote that "Hopkinson made a most satisfactory reply, keeping to the law and not following Holmes and Wirt into fields of declamation and fine speaking."

By the custom of the day, no verbatim transcripts were made of the orally presented arguments, and ordinarily the only record, if any at all, consisted of abbreviated summaries prepared by Henry Wheaton, Washington lawyer, for his monumental *Reports of Cases Argued and Adjudged in the Supreme Court of the United States*. The existence of a more complete record in the case of the *Trustees of Dartmouth College v. Woodward* is due to the efforts of Timothy Farrar. Dartmouth graduate in the Class of 1807, and named for his father who was an "Octagon" Trustee, young Farrar was a Portsmouth lawyer and close friend of both Daniel Webster and Jeremiah Mason. The College cause had aroused his lively interest. With Webster's encouragement, he put together a volume containing not only the opinions in both the New Hampshire and Federal courts but also the arguments presented before each court. Webster, shortly after his argument in the United States Supreme Court, prepared a full and careful statement of it for a purpose which will be referred to hereafter. This he made available to Farrar. Later, expressly for the Farrar volume, Webster prepared a summary of Hopkinson's argument, using notes furnished by Hopkinson. Much less space in Farrar's volume is devoted to the presentations of Holmes and Wirt. Farrar had made a conscientious effort to obtain from the University's counsel full reconstructions of their arguments, but for understandable reasons these men had by the late spring of 1819, when the Farrar volume was in progress, rather lost interest in the case. The probabilities are that the truncated renderings of the defense arguments which Farrar finally had to use were in fact prepared by Wheaton in the normal course of his work and lent by him to Farrar in exchange for the longer treatments covering Webster and Hopkinson. In the end both the Farrar and the Wheaton volumes reproduced substantially the same versions of the four presentations, but because the summaries are unequal in depth it is not possible today to compare them even-handedly.

Upon the conclusion of the arguments of counsel, Chief Justice Marshall announced that because of differing views among the judges a decision would be deferred until the next term, a year hence. The prospect of uncertainty so prolonged was more disturbing to University adherents than to the College. The hopes of the former were entering a state of deflation; while the College people had derived bright, new faith from the way the case had gone in Washington. Salma Hale tried to reassure Allen: "The continuance of the cause ought not to diminish our confidence. The importance of the question required it of the Court. . . . The College Trustees were in the same manner elated after the argument at Exeter, & I trust their hopes will in the same manner be disappointed."

For the benefit of Judge Smith, Webster shrewdly analyzed the College's prospects at the hands of the seven-man Supreme Court: "I have no accurate knowledge of the manner in which the judges are divided. The Chief and Washington, I have no doubt are with us. Duval and Todd perhaps against us; the other three holding up. I cannot much doubt but that Story will be with us in the end, and I think we have much more than an even chance for one of the others. I think we shall finally succeed."

Hale's tally sent to Allen was as usual over-optimistic: "I am really serious when I assure you that I consider our chances of success 5 to 2. It is more than an even chance that the count will stand 6 to 1."

The accustomed University euphoria quickly subsided as they faced realities. First among these was the necessity of paying their counsel. Holmes had concluded his report to Allen with the blunt observation that "Mr. Wirt and your humble servant are of opinion that some fees ought to be forwarded." Also Hale, having deduced from Wirt's comments that $500 would be an appropriate fee for the Attorney General's services, began pressing President Allen for payment by the University. Allen replied that he had "reason to think that the funds [of the University] are not in good state, for I have received *nothing* for my services [for] more than a year." He said that Woodward, as University Treasurer, believed "we must obtain money by solicitation . . . but my chief hope rests upon the Legislature at the session of June." June seemed too far away to Hale and the other University supporters in Washington who had urged Wirt's employment. Hale felt himself personally obligated to Wirt, and in mid-April he wrote to Allen: "I have paid Mr. Wirt $200 & Mr. Ripley paid him $100."

Allen pointedly reminded Governor Plumer that the "difficulties under which we labor . . . will render it important that we secure pecuniary aid from the next legislature in order that we may continue the Institution." In anticipation of favorable action by the legislature the University Board "appropriated" a sum not exceeding five thousand dollars for the payment of counsel, for the payment of salaries due the officers of the University, and for incidental expenses. But the legislature limited its commitment to $4000, and then not as a grant but as a one-year loan to be conditioned upon security from the University Trustees in their corporate capacity. At an ensuing meeting, the University Board cut their earlier "appropriation" to fit the cloth.

Among the stipulations of the legislation creating the University was the requirement of an annual report by the University President to the New Hampshire Governor. This report Allen dutifully filed on July 7. It was a catalogue of University troubles: "The number of students is sixteen; — many students continuing under the instruction of the displaced officers of the seminary who in disregard of the law of the State keep up in Hanover the form of a college." Speaking as of two years after the passage of the enabling legislation, the report stated tersely: "The overseers have not as yet found a quorum." Allen cited the ill health of William Woodward, Secretary and Treasurer of the Board, as an explanation for the President's not having "a copy of the votes and proceedings of the corporation" to include in his report. The same circumstance also served as a justification for the absence of a precise financial account. Allen recalled Woodward's report of the preceding year, which "calculated . . . that there was due to the University . . . upwards of eight thousand dollars; — but being due principally from former

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students now scattered over the United States, and from lessees of lands in Vermont and New Hampshire many of whom are poor, — it was thought that a large part of the sum due would eventually be lost." Allen estimated that "the sum which the Legislature has resolved to loan to the corporation is not more than will be requisite to meet . . . claims and expenses" for officers' salaries and law suits.

Throughout the winter and spring of 1818 the health of William Woodward steadily declined. In early April, Allen described him as "very feeble." In June, Dr. Cyrus Perkins of the Dartmouth Medical School was appointed by the University Trustees to serve as Treasurer with Woodward, since the latter's health no longer permitted him to perform his duties actively. On August 9 Woodward died, "his mind almost utterly in ruins." Allen correctly described Woodward's death as "a great loss to . . . the University as no one was so well acquainted with its concerns."

During the spring and summer of 1818 the College, too, was beset with problems flowing from a prolongation of the uncertainty about its future. Under severe financial pressure, it needed funds not only to keep its officers and faculty from hardship but also to pay further fees for counsel. President Brown set to work again to raise support among friends of the College. The continuing uncertainty likewise rendered acutely difficult the President's efforts to fill a vacancy in his faculty. One candidate, after some euphemistic dodging, finally conceded that "a decision of the Dartmouth cause favourable to the College will be likely to draw after it an affirmative one from me." Chief among the College's preoccupations was the carrying forward of the Circuit Court cases. Though Webster had gone into the March argument before the Supreme Court armed with the knowledge that Circuit Court suits would be started, they were not actually begun until later.

It fell to President Brown, Charles Marsh, and Mills Olcott, with the advice of Jeremiah Mason and Judge Smith, to mount this second front. Three different suits were contrived, all based on "diversity of citizenship," with Marsh, the Vermont lawyer, designated to attend to procedural aspects peculiar to that State. The suits were begun in late March 1818. One of them was against President Allen to recover possession of certain college buildings under a lease executed for this purpose by the College Trustees. The action was brought by a convenient Vermont plaintiff who turned out to be none other than Charles Marsh himself. A further suit was filed by another willing Vermonter to eject a New Hampshire tenant of the University. A third Vermonter (the accommodating supply seemed inexhaustible) filed still another suit against an additional hapless tenant of the University. These suits were set for initial hearing at the May term of the Federal Circuit Court which was to be conducted in Portsmouth before Judge Story in company with the District Judge. In mid-April Jeremiah Mason wrote to Marsh that "the counsel engaged in your first cause being pretty well exhausted . . . expect you to come [to Portsmouth] with a treasury of new things & that you will take upon you the principal burden of the argument . . ."

It was expected that the defendants, when the term opened, would ask for continuations, so that they might have time to prepare their defenses. This they did. Judge Story, in granting this request, enjoined the defendants to be prepared to try the suits early in the September term. It was important, he said, that one or more of the suits be carried to the Federal Supreme Court at its next term in February 1819 when a decision was expected in the principal case, *Trustees of Dartmouth College v. Woodward*. Marsh wrote to President Brown that Story had explained this specification on the grounds that the Woodward case might not permit a consideration of "all the questions that would naturally arise and it was time that the controversy should be finished."

Midst the preoccupations of both institutions with litigation, new and old, the 1818 Commencement appeared as a decorous interlude. Mindful of the undignified occurrences of the preceding year President Brown wrote to President Allen in June, well in advance of the exercises scheduled for August, saying that he and the College Trustees were "very desirous of avoiding at the ensuing Commencement the collision respecting the occupation of the meeting house which was unhappily witnessed at the last Commencement."

> "We consider ourselves to have an unquestionable right to the use of that edifice for our public exercises at the usual time," said Brown, "& we entertain a hope that you will leave us in undisputed enjoyment of a privilege without which we may be seriously incommoded. But we are prepared at this instance to recede from our right rather than to be involved in an unpleasant contest & to hold our Commencement on a different day or even a different week from that heretofore established.
>
> "The object of this communication is to request to be informed by you whether the Trustees & officers of the University intend to claim the meeting house on the [customary] 4th Wednesday in August . . . or whether they will leave the trustees, officers, and students of the College in possession of it on that and the two preceding days unmolested by them or by other persons acting by their authority & at their request."

On the following day President Allen replied equivocally:

> I would inform you that the Commencement in Dartmouth University will be held at the usual time. We have as yet made no particular arrangement as to the place of holding Commencement. The avoidance of a collision, as you intimate, is certainly desirable; but our claims to the meeting house you may have reason to suppose — we consider as strong as you consider yours.

Three days later President Brown expressed to Allen his regret that the latter's reply was "not more explicit":

> There are many circumstances which in our judgment render it desirable for all concerned that the Commencements of both institutions should be simultaneously holden. But the experiment of last year shows that the exercises of both cannot. with convenience to either, be performed in the same edifice on the same day.

The University officers were acutely sensitive about the relative smallness of their institution and a corresponding lack of splendor in their Commencement exercises. Brown mercilessly touched the sore spot: "We entertained a hope," he wrote urbanely to Allen, "that you would find yourselves well accommodated in the Chapel; whereas it must be obvious to you that we have no building which would in any tolerable manner answer our purposes, except the meeting house." Determined to be reasonable, Brown repeated his desire to avoid a contest and the resolve of the College Trustees to change the time of their exercises "unless we obtain an assurance from you that the University will not disturb us in the enjoyment of our customary privilege. . . . We wish a distinct declaration of your intentions." He requested a prompt decision because of the need for ample notice to many interested persons. But Allen, four days later, perpetuated the state of uncertainty by replying that "the Trustees whose duty it is according to ancient practise to determine the place, have not acted upon the subject, nor will they meet again until a short time before Commencement." In conse-

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quence, the College concluded to hold its exercises one week earlier than the customary date.

Allen evidently notified his Trustees of the exchange with President Brown, for in July, Elijah Parish, conspirator with John Wheelock in the anonymous publication of the *Sketches* and now a Trustee of the University, described his reactions in a letter to Governor Plumer. After a characteristically fawning introduction, Parish wrote:

> No doubt the College and Brown & Co expect great credit for this condescension respecting commencement, but in my opnion they think themselves very cunning. No doubt they will expect all the clergy, and most of those in other professions who ever attend Commencement and are delighting themselves with the anticipation of our diminutive process and empty house . . .

But just before the University commencement Allen wrote to Salma Hale, University Trustee, that hopefully "our performance [at Commencement] will be sufficient in number, & weighty in worth." However, the occasion was dampened by the failure of the Governor to attend. It suffered, too, from the presence of only a half-dozen in the graduating class, as compared with twenty-six graduates from the College the week before.

MEANWHILE the long year between the Washington hearing and the Supreme Court's decision slowly unrolled. Neither Webster nor President Brown was inclined passively to sit out the interval. At the close of the hearings Webster had confidently predicted that at least four of the seven Justices would support the College. But a four-to-three projection posited a precarious margin on which to rely, and Webster determined to do what he could to enlarge it. Thus, when he returned to Boston a week after the Supreme Court hearing, he resolved to put into readable form his own argument. He wrote to Mason on April 22 that "since I came home, a young man in the office has assisted me to copy my minutes, and I have been foolish enough to print three or four copies. . . . These copies are and will remain, except when loaned for a single day, under my own lock and key. . . . There is no title or name to it. These precautions were taken to avoid the indecorum of publishing the creature."

Webster promised to send Mason a copy, but admonished him not to "let Farrar see it, because he would wish to show it to President Brown and all." He added, ". . . perhaps I should do better to burn it, than to send it at all." However, shortly thereafter he sent copies to both Mason and Judge Smith, declaring to the latter that he intended "not to let the [copies] get too much abroad."

Webster soon overcame his hesitancy about enlarging the circulation of this printed version of his argument. A transformation akin to what happened to the loaves and the fishes was undergone by the "three or four copies" which he had acknowledged printing; for in the course of the ensuing weeks he distributed a considerably larger number to, among others, Brown and Farrar. By July a copy had reached the students at the College. Webster urged President Brown to do what he could to prevent them making "indiscreet use of it. . . . Pray caution the students against publishing it, or any part of it." Among other copies sent out by Webster, one went to a lawyer alumnus of the College with the explanation that he had been moved to "exhibit in print our view of the cause" as counteractive to the widely circulated opinion of the New Hampshire Superior Court. To preserve the proprieties, Webster added: "A respect for the [Supreme] Court, as well as general decorum seems to prohibit the *publishing* of an argument while the cause is pending. I have no objection to your showing this to any professional friend in your discretion. I only wish to guard against its becoming too public."

Surely Webster's dominant purpose in what became a generous, but selective, distribution of his printed argument, during the spring and summer of 1818, was his hope that an exposure to his reasoning would be found persuasive to influential readers, the views of at least some of whom might be treated with respect should they come directly or indirectly to the ears of individual Justices of the Supreme Court. Significantly he wrote to Hopkinson in early July, ". . . many persons, even in the profession, were not well informed as to the grounds of the case. They had read the N. H. opinion and as a very distinguished man among us said to me 'though they revolted from the conclusion they could not exactly see where the fallacy lay'." It seems a fair surmise that the "very distinguished man" was Justice Story, whose *ex camera* remarks Webster was in the habit of obscuring with an anonymous attribution. Webster went on to tell Hopkinson that he had given Justice Story a copy of the printed argument: "It enables our friends to reason on the subject, and puts them to thinking a little."

On target was another sowing of the printed text. During the summer of 1818 James Kent, then Chancellor of the New York Court of Chancery and a highly respected jurist, on a journey from his home in Albany paused briefly in Hanover and in Windsor, Vt. While in the area, encouraged by University adherents, he read the opinion of the New Hampshire Superior Court, and word reached the College forces that the Chancellor had been impressed with the reasoning in that opinion. The tidings were ominous, for Supreme Court Justice William Johnson was a long-time, close friend of Kent and was said to hold a high respect for Kent's opinion on questions of the law. Charles Marsh resolved to send Chancellor Kent a copy of Webster's argument in the hope that it would alter Kent's views. That the tactic had the desired effect was amply established by Kent's reply to Marsh. The Chancellor readily conceded he had been "led by the [New Hampshire] opinion to assume the fact that Dartmouth College was a public establishment for purposes of a general nature. . . . But I will declare to you with equal frankness that the fuller statement of the facts in Mr. Webster's argument in respect to the origin and reasons and substance of the charter of 1769 and the sources of the gifts, *gives a new complexion to the case*, and it is very probable that if I was now to sit down and seriously study the case with *the facts at large* before me, that I should be led to a different conclusion from the one I had at first formed."

FURTHER INDICATION of the harvest which the printed text produced came in July when Justice Story asked for several additional copies. In supplying them Webster continued to show concern about the proprieties. He said to Story, "If you send one of them to each of such of the judges [of the Supreme Court] as you think proper, you will of course do it in the manner least likely to lead to a feeling that any indecorum has been committed by the plaintiffs. The truth is, the New Hampshire opinion is able, and something was necessary to exhibit the other side of the question."

President Brown on a visit to Albany in September was able to confirm Chancellor Kent's agreement with the Webster argument. Kent readily conceded he had initially favored the reasoning of the New Hampshire Court. Brown, quick

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ORDER OF EXERCISES.

COMMENCEMENT,

AT

DARTMOUTH COLLEGE.

AUGUST, 27TH 1817.

PRAYER.

SACRED MUSIC.

1. Salutatory oration in latin ; *The effects of the study of the Roman Classics on the morals.*
BY JACOB SCALES.

2. English oration ; *The origin, characteristics, and proper use of satire.*
BY LEONARD WILCOX.

3. Forensic disputation ; *Did the introduction of Christianity hasten the downfal of the Roman Empire ?*
BY HENRY W F DAVIS & ADEL CALDWELL.

4. English oration ; *Some of the deficiencies and errors of the scholar.*
BY NATHAN FISK.

MUSIC.

5. Philosophical oration *On the production and propagation of sound.*
BY CARLTON CHASE.

6. Conference ; *A Comparison of the reigns of Queen Anne and Louis XIV*
BY JAMES HOWE & EBENEZER WOODWARD.

7. Greek oration ; *The state of Grecian Literature in the age of Plato*
BY WILLIAM GOODELL.

MUSIC.

8. English oration ; *The genius and dramatic character of Shakespeare.*
BY JOHN ADAMS.

9. Dialogue *On the comparative improvement, which American Literature will probably receive from the pulpit and the bar.*
BY BENJAMIN HUNTOON, & BENJAMIN WOODBURY.

10. Conference ; *Italy, Palestine and Greece, as interesting to the American Traveller.*
BY DAVID PAGE, ADAM GORDON & CHARLES F. GOVE

MUSIC.

11. English oration ; *The ultimate effects of the writings of David Hume on religion and philosophy.*
BY DANIEL TEMPLE

12. Dialogue *On the probability, that America will rise, in literature and the liberal arts, to the eminence of ancient Greece.*
BY LEMUEL SMITH, & BENJAMIN DORR.

13. English oration ; *The partialities and prejudices of great minds.*
BY MARSHALL SHEDD.

MUSIC.

14. English oration *On National Character,* by Mr GEO. KENT candidate for the degree of Master of Arts.

MUSIC.

DEGREES CONFERRED.

15. Valedictory address ; *The effects of literary retirement on intellectual character.*
BY JAMES MARSH.

SACRED MUSIC.
PRAYER.

The controversy produced no shortening of Commencement.

to appreciate the significance of the Chancellor as an ally, reported at some length to Webster:

> I think it may be of some importance to the right decision of the case, that the chancellor should not only have a correct opinion, but should be induced to declare it. Judge Johnson has been here. This the chan. mentioned, & he also said that the judge conversed on our case, & remarked that the court had a cause of 'awful' magnitude to decide &c. From what I learn from other sources the judge has formally requested the chan.'s opinion. This opinion, if given, will also have great influence on Judge Livingston. Now I think the chan. on examination of the case, cannot fail to be right. He had, he said, great pleasure in reading your argument, and spoke in terms sufficiently flattering of the legal ability & logical power displayed it it, & added he should probably, if he had time to examine all the facts, agree fully with you. But still there was some reserve, which perhaps arose altogether from an apprehension that I should imprudently report what he might say, — but possibly it may be otherwise.

In Webster's reply to Brown he claimed, not without sangfroid, that he had "never doubted for a moment on which side C. K.'s mind must ultimately rest. I have studied him (and his work) many years, & think I understand him. . . . His opinion will have weight wherever it is heard. I hope he will express himself as occasion may offer."

In September the continued Circuit Court cases came before Story in Exeter. The University was again represented by Messrs. Sullivan and Bartlett, and Mason and Smith remained the College's representatives. Charles Marsh, as one of the plaintiffs, was present. Just before the Court hearings Webster visited Exeter where he consulted with his associates and with Marsh. He was able to report to Brown that "the causes look quite promising. I think there will be little doubt of some or all of them going up." Webster had early specified to Mason that "the question we must raise in one of these actions, is, 'whether, by the general principles of our governments, the State legislature be not restrained from divesting vested rights?' This is of course independent of the constitutional provision respecting contracts. . . . [It] is the proposition with which you began your argument [before the New Hampshire Superior Court] and which I endeavored to state from your minutes at Washington. The particular provision of the New Hampshire Constitution no doubt strengthens this general proposition in our case; but in general principles I am very confident the court at Washington would be with us."

The Circuit Court hearings went off to the complete satisfaction of Marsh. He reported to Olcott and Brown in Hanover that a special verdict had been agreed upon in all three cases, and that he had seen "nothing unfavorable to our eventual success. . . . The court appeared resolved to have the causes prepared in such a manner as to have them carried to Washington avowing as the reason that the real question in controversy would be more fairly and fully presented than in the former action." Marsh also informed Brown that he had "written Mr. Webster . . . to have the actions entered early on the docket of the Supreme Court."

WHILE the College had widened its attack by instituting the Circuit Court cases, the University had simultaneously mounted a counteroffensive directed at obtaining a reargument of the principal case before the Supreme Court in Washington.

So shocked had the University protagonists been by the contrast between the performance of their counsel in Washington and that of the College, and so unprepared were they for the failure of the Supreme Court to decide at once in their favor, that they looked for an explanation which would reflect not upon their cause but upon the College and its counsel. The managers of University strategy grasped at a supposition that Webster and Hopkinson had improperly introduced points in the case at Washington which had not been offered in the New Hampshire court, and had buttressed them with misstatements of fact. Thus the University determined, if possible, to bring about a reopening of the case in Washington, enabling their counsel to introduce "new facts" controverting those advanced by the College counsel.

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Because of the technicalities involved there is a temptation to leave unmentioned or to slur over the supposed basis for a new argument in the principal case, as claimed by the University. But without some understanding of it the balance of the legal maneuvering appears to be only a meaningless ballet. The following explanation suffers from oversimplification, but it will convey an idea of what was involved.

Between the time of the New Hampshire and the Washington arguments Webster had given special attention to the English doctrine regarding charitable trusts and had conducted some correspondence with Justice Story on the subject. In presenting the case to the Supreme Court he had laid a new emphasis on Eleazar Wheelock's role as *founder* of the College, and upon the privileges of control which accrued to the founder of a charitable trust, capable of being passed on to succeeding trustees. Thus Webster developed the thesis that the elder Wheelock, as founder, had caused his privileges and powers to descend to the Trustees of the College, where they continued to be lodged, as unchallengeable as they would have been in his own hands. This was more a shift in emphasis than the introduction of a different argument, as Webster declared to Judge Smith. Long after Webster had delivered his argument, he received from England some books on charitable uses "not to be had here" which convinced him that in his argument he had arrived, by *a priori* reasoning, at the correct view. He remarked to President Brown in December 1818 had he had the books "a year ago they would have saved me a good deal of labor." He added significantly, they are "now leant to Judge Story."

But whether Webster's points before the Supreme Court constituted a different argument, or an old one remodeled, they rested heavily upon Wheelock's being in fact the "founder" of the College, as the charter preamble declared him to be. In substantiation of this, Webster alluded to the elder Wheelock's own gifts to the College and his instrumentality in obtaining contributions from English donors by way of the English Trust of which the second Earl of Dartmouth was chairman. It was on this point that the University now thought they had Webster skewered.

To understand the basis for the University's fresh expectations it is necessary to scrutinize certain circumstances associated with the granting of the College's charter. In applying to John Wentworth, Royal Governor of the Province of New Hampshire, for a charter, Eleazar Wheelock intended that the newly chartered institution would encompass and, indeed, replace his earlier creation, Moor's Indian Charity School, that the latter would cease to exist as a separate entity. The new entity — the College — was to take over the aims of the Charity School — the educating and Christianizing of Indians — and merge them into a matrix which, "without the least impediment to said design . . . may be enlarged and improved to promote learning among the English, and be a means to supply a great number of churches and congregations, which are likely soon [to be] formed in that new country, with a learned and orthodox ministry." It seems evident from the foregoing language in the charter's preamble, which Wheelock himself drafted, that he assumed the men in England, including Lord Dartmouth, who held the funds donated there for the benefit of Moor's Indian Charity School would accept this enlargement of purpose as being consistent with the terms under which the funds had been collected and were being held in trust. This assumption seems to have been in harmony with Governor Wentworth's own impression of Lord Dartmouth's interest, for when Wheelock proposed that the new College be named Wentworth in his honor, the Governor countered with the recommendation that it be called Dartmouth College. However, after all the formalities had been completed and the College had come into existence under the 1769 charter, Wheelock received word from Lord Dartmouth indicating that the English Trustees disassociated themselves from the new college. In fact Lord Dartmouth took the position that the application of any of the Trust funds to the College would be an intolerable diversion.

It is not difficult to imagine the consternation which this communication must have caused Wheelock. But he had before bent with the wind in pursuit of his great design, and he was prepared to do so again to retain access to the English funds. He restored to life by legerdemain Moor's Charity School as an institution separate and apart from the College. Only after his assurance to the Earl of Dartmouth that the English money would be used exclusively in support of Moor's School did the English Trust continue to remit to Wheelock.

Though documentation of this sequence was at all times available in the Wheelock files, as the events themselves dropped more distantly into the past and as death removed persons with firsthand knowledge of them, a disposition arose in the College family to view the historical background of the institution as the charter preamble described it, rather than as it had actually occurred. This misconception thrived on a certain vagueness which had come to permeate the status of the Charity School in the minds of persons lacking intimate association with the College's past. In consequence, a legend early took hold and, despite its not infrequent disproof, still persists in many minds. The legend is that the English donors, including the second Earl of Dartmouth for whom the College was named, were in fact donors to the new College and specifically encouraged its establishment.

It would seem certain that Webster, and all of his contemporaries, grew up in the acceptance of this legend, for after all, it was consistent with the text of the preamble to the College's charter. Thus when he and his fellow counsel, in their endeavor to establish that Dartmouth College was not a public corporation but a private eleemosynary corporation, represented to both the New Hampshire Superior Court and the United States Supreme Court that part of the initial charitable gifts to the College came from English donors, led by the Earl of Dartmouth, they were asserting a widely held misunderstanding. So general was the assumption that events had occurred as described in the charter that not even the University officers and their counsel appeared aware of the factual divergencies until after they had passed through trials in both courts. It is clear at least that President Allen, guiding the hands of University counsel, did not make an effort to uncover, until after the Washington hearing, a record of what had actually happened in the early days.

By the August 1818 meeting of the University Board, Salma Hale, William Allen, Cyrus Perkins and others had become convinced that a motion for a reargument before the Supreme Court should be made. This was to be based not only on "new facts" with respect to the English donors, but also with respect to College counsels' assertions that Eleazar Wheelock was the "founder" of the College and himself a contributor of funds to it. The "new facts" were directed toward demonstrating that the King and the Province of New Hampshire were the sole sources of initial gifts to the College, and were intended to strengthen the proposition that the

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College was in deed a "public corporation." Accordingly, at its August meeting the Board authorized the employment of counsel to secure a reargument and, remembering their earlier improvident selection, they turned this time to William Pinkney of Baltimore. He accepted.

In choosing Pinkney, the University authorities put their fortunes in the hands of one generally acknowledged to be a leader of the American bar. Formerly U.S. Attorney General under James Madison, Pinkney was fifty-four years old when engaged by the University. He had not long before returned from two years abroad as American minister to Russia. Vain, flamboyant in his dress and manner, Pinkney invariably turned an appearance in court into a performance. But with all his questionable qualities of manner, he was regarded as the most versatile advocate of his time.

On Pinkney's acceptance of the assignment to secure a reargument of the University's case before the Supreme Court, President Allen wrote him in early September that

> the Trustees of Dartmouth University will not fail duly to estimate the liberality with which, out of regard to a learned Institution, your services are proferred. With the assurance, which you have given, of your best exertions as counsel in their behalf, they will rest satisfied, that a cause so interesting to themselves and so important in its results to our country could not be entrusted to better hands.

From Hanover, Allen forwarded to Pinkney in Washington a summary of Webster's argument ("The argument is printed, but most cautiously kept from us. I have however read it in a wretched Mss & have made the enclosed very short abstract"). Allen said he had "lately examined all the papers belonging to Dr. Eleazar Wheelock relating to the School & College. I find facts opposed to Mr. Webster's statement . . . of which I can at a future time apprise you."

Shortly thereafter, while attending to business in Exeter, Webster learned that the University had retained Pinkney. "This will occasion another argument at Washington," said Webster to President Brown, "which I regret, on some accounts. I do not fear that it will increase the danger to our cause, which I trust will grow brighter by discussion, but who is to argue it on our side. I do not feel as if I could ever undertake it again, & hardly know what to recommend to you. As Bro. Holmes retires probably from the cause the next time, I think it would be prudent for me to retire with him. Of all these things we must consult hereafter."

Webster also notified Marsh of his reluctance to appear for the College in a reargument at Washington, and Marsh, no doubt much concerned, forwarded the letter to Brown, who on November 4 wrote to Webster:

> . . . in the judgment of all the friends of the College we must rely chiefly on you, in the contemplated discussions at Washington. Nor do I think this will require a new argument on the old ground. For if you propose to the court & the adverse counsel that the plaintiffs have nothing to add, & mention this in season, is it at all probable they will require anything more. But *if they should,* what shall we do? Why, indeed, I know not. For who would be willing to go over the same ground after you, which you would be unwilling to retrace yourself. To me it is clear, that no man in the country would undertake this task. Mr. Marsh mentions that Judge Smith or Mr. Mason might possibly be persuaded to go on. We should repose the most entire confidence in either of them. But what could they say which had not been said. I despair on this point; and therefore I do not believe they would go. . . . But I beg you to allow us to expect that you will yourself reply to Mr. Pinkney . . . it will not be possible for any man, not deeply versed in the history of D.C. & Moor's I.C.S. to possess the requisite knowledge to enable him to unravel & explain all the matters & things. . . . Indeed a considerable part is unintelligible by anybody. The School is *alter, et idem* with the College, as occasions require. . . . Why it is I will endeavor to explain to you on some future occasion. I have been laboring through the [Eleazar Wheelock] "narratives," etc, etc. of which I intend to attempt something like a digest, & transmit the same to you in due season. . . .
>
> And now, Sir, as to compensation for yourself & Mr. Hopkinson in the new causes, will you tell me what it should be? I intend to make a new effort, if Providence permits, in N.H. & should be glad to know the sum necessary to be raised before you go to Washington. It is my present intention to be in Boston by the middle of January.

Webster replied at once, saying:

> It will not be necessary to decide on the subject of other counsel until I see you . . . suffice it to say, at present that, although if nothing should be necessary in the way of argument but a reply, Mr. Hopkinson, or myself, might do that, yet if it should be necessary to go over the whole ground again, some new hand must come into the cause. My own impression is to apply, in case of need, to some gentleman there on the spot. Let this rest until January.
>
> As to money and compensation, etc, I hardly know what to say about it. As to myself, considerations of that sort have not added greatly to my interest in the case. I am aware, also, that others, whose labors are more useful than mine, are obliged to confer gratuitous service. The going to Washington, however, is no small affair, and is attended with inconvenience to my practise here. My other inducements to attend the ensuing term are not great, not so much so as last year, while the sacrifice here will be greater.
>
> As to Mr. Hopkinson, he has put the case on such ground, that nothing can be done about his compensation till a final decision. If that should be as we hope, something honorable must be done for him; towards which I expect to contribute in proportion to my means, and in common with other friends. I hope you will be here a little sooner than January 15, as I hope to be able to set off by that time. I rely on you for all necessary knowledge of Moor's Charity School; not caring so much about it as you seem to. The cause has gone too far to be influenced by small circumstances of variance. . . .
>
> I wish you to understand that if I go to Washington, and am paid for it, any thing necessary to new counsel there, I shall pay. It is not my intention that any arrangement of this sort shall increase expense. I am not certain that a new argument will be ordered, and I am still more doubtful whether a new opening on our side will be called for. But this is possible, and if so, some gentleman must repeat our view, and add what he or we may have obtained new. This event of course of things is not probable, but possible.

Webster wrote to Hopkinson to alert him to Pinkney's probable entry into the case, and to suggest a course of action. Hopkinson replied that he had already encountered Pinkney "who told me he was engaged in the cause of the University, and that he is desirous to argue it, if the court will let him":

> I suppose he expects to do something very extraordinary in it, as he says Mr. Wirt was not strong enough for it, has not back enough! There is a wonderful degree of harmony and mutual respect among our opponents in this case. You may remember how Wirt and Holmes thought and spoke of each other.
>
> On receiving this information from Mr. Pinkney I seriously reflected upon the course it would be proper for us to take; and I assure you most truly, I decided precisely in favor of that suggested by you. It cannot be expected we shall repeat our argument

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merely to enable Mr. Pinkney to make a speech, or that a cause shall be reargued, because, after the argument has been concluded, and the court has the case under advisement, either party may choose to employ new counsel. I think if the court consents to hear Mr. Pinkney, it will be a great stretch of complaisance, and that we should not give our consent to any such proceeding; but if Mr. Pinkney, on his own application, is permitted to speak, we should claim our right of reply. The court cannot want to have our argument repeated; and they will hardly require us to do it for the accommodation of Mr. Pinkney. However, we shall have an opportunity to consult more fully in these matters.

A THREAT to the College's fortunes began to show itself in another quarter in the closing months of 1818. Beginning with a slight indisposition evident at Commencement in the preceding August, President Brown's health took an ominous turn by the end of the year. It was a cause for profound concern on the part of all friends of the College. In December, Webster urged him to postpone a promised fund-raising trip to Boston "until your recovery is complete. . . . As far as relates to any provision for the expenses at Washington, etc., I would have everything remain as it is. . . . Let us hear from you every week respecting your health." Later in the month Webster again protested against President Brown's journeying to Boston just to raise funds for counsel fees: "That object *must not* be put in competition with your health. The season is severe. Exposure might endanger you — & I would by no mears have you come here at any risk. Give me all the information you can by *your pen* & let me go. Among other things set down all the inaccuracies which you have noticed in my argument."

As additional reports reached the ears of President Brown regarding the "new facts" with which the University expected to reverse the tide, he anxiously passed them on to Webster. The latter, however, continued to minimize their significance: ". . . all these ideas of theirs had occurred to me & I think they are not formidable — perhaps there may be more in them than I am aware."

Meanwhile, President Allen was pressed to get into Pinkney's hands any information that might be helpful in supporting a request for a new argument. From a frantic search through "the old papers of Dr. E. Wheelock" Allen concluded that ". . . they prove some facts of consequence, which put down the position of Mr. Webster. . . . They prove that Dr. W. furnished no funds to the college — that Lord Dartmouth furnished none & disclaimed all connection with the Charter — that the college was built on the King's lands, & that the King gave the said lands to the trustees for the use of the College in 1771, 2 years after the date of the Charter — that Dr. W claimed the [Moor's Indian Charity] School as his own after the charter."

Allen sent the elder Wheelock's papers first to Sullivan for use in preparing a statement of facts for use in a new special verdict for the Circuit Court cases. But two weeks after the Circuit Court hearings were finished, Allen had neither heard the outcome from Sullivan nor received the return of the Wheelock papers. In consequence, he had been unable either to inform Pinkney of the results or to send original documentation on the "new facts." Finally, in late November, two months after the Circuit Court hearings, Allen sent copies of the Eleazar Wheelock documents to Pinkney. At the same time, having learned that Sullivan and Bartlett had made no use of the original documents after all, Allen sent a special messenger for their recovery. But no sooner were the Wheelock papers back in Hanover than the University Trustees insisted they be returned to Sullivan and Bartlett to obtain the consent of the College's counsel to include them in a statement of facts to go up with the Circuit Court cases to the Supreme Court in Washington.

Judge Smith, to whom Sullivan ultimately submitted the papers, assured Brown that the so-called "new facts" would not be found to be of much significance. The College's counsel succeeded in limiting the factual statement to the actual texts of the newly offered documents, and avoided the sanctifying of any deductions from them. "You need not apprehend," wrote Smith to the President, "any sacrifice of your interest by *neglect* of your counsel — an appeal lies to J. Story as to the papers to be admitted — whether it will be made or not [I] can't yet say."

Thus as 1819 opened, Webster prepared himself for the Washington trip. Timothy Farrar in Portsmouth sent to him the certified records of the Circuit Court cases, observing "one of the papers herewith . . . is not included in any argument yet made, viz. the letter from the Trust in England to Eleazar Wheelock." The letter to which Farrar referred was the one written in 1771 in which the English Trustees, including the Earl of Dartmouth, disassociated themselves from the College, and insisted that the Trust funds not be diverted from the Indian Charity School to the College. It seems certain that this was the first time Webster had actually seen the text of that letter. Farrar reported new Portsmouth rumors of ultimate University success. "I understand," he said, "Master Ichabod [Bartlett] has lately spoken in a way to induce the belief that there is an open door between him, or some of these folks, & the judges — that they have expressed themselves very fully upon the subject — and that it is perfectly certain the cause will be decided in their favour."

Shortly after mid-January, Webster set off for Washington, "prepared," as he wrote Brown, "with all the necessary papers."

THE University forces sent Dr. Cyrus Perkins to advise with Pinkney, despite Hale's feeling that it was unnecessary. On January 18 Perkins reported from Baltimore to Allen that he had had "repeated conferences with Mr. Pinkney. . . . He does nothing about [the case] except I am there. I see more than ever the importance of someone being on the ground to attend to these great folks & remind them of what they have to do."

Perkins assured Allen that "Mr. P. will come out in the majesty of his strength . . . [he] professes to feel strong in the cause — hopes that Mr. W. will appear on the floor again; from which it is to be inferred that he feels ready and able to meet him on the question. . . . Mr. Pinkney is very civil & very patient to hear any suggestions on the subject — much more so than I had anticipated."

Then as the end of January approached, Perkins wrote again to Allen, this time from Washington:

I spent longer in Baltimore than I had intended, to please Mr. Pinkney who would not dismiss me till he thought he had derived all the assistance which I could render him, in explaining the papers relating to our cause & in helping him to understand the history & present state of our affairs.

I have been with Mr. Wirt & exhibited to him the papers. But owing to the press of business just at this moment he was unable to give much attention to the subject. . . . Mr. Wirt being engaged in several important cases before ours on the docket he observed he should be under the necessity of first going into an examination

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& preparation of these, before he should be able to give much attention to ours. He requested me, in the meantime, to make out a reference to the several papers and documents which go to the establishment of the important points on which we are to rely. Mr. Pinkney & Mr. Wirt both complain that the special verdict [which emerged from the Civil Court cases] is very imperfect. . . .

THE February 1819 term of the Supreme Court of the United States opened on the first day of the month. On that day Webster wrote to Farrar: "Mr. Pinkney will be in town today, and I suppose will move for a new argument in the case vs. Woodward. It is most probable, perhaps, that he will succeed in that object, although I do not think it by any means certain. Not a word has as yet fallen from any judge on the cause. . . . All that I have seen, however, looks rather favorable. I hope to be relieved of further anxiety by a decision for or against us. . . . I'd not have another such cause for the College plain and all its appurtenances."

But the next day Webster's expectations of Pinkney failed to materialize, and all the last-minute efforts of Allen, Perkins, Hale, Pinkney, and Wirt to redirect the course of the *Trustees of Dartmouth College v. Woodward* turned out to be barren. On the second day of the term, February 2, 1819, "[Pinkney] being in court," as Webster later described the scene to Mason, "as soon as the judges had taken their seats, the Chief Justice said that in the vacation the judges had formed opinions in the College cause. He then immediately began reading his opinion, and, of course, nothing was said of a second argument." The same day Webster wrote triumphantly to President Brown:

All is safe & certain. The Chief Justice delivered an opinion this morning, in our favor, on all the points. In this opinion Washington, Livingston, Johnson & Story, Justices, are understood to have concurred, Duval, Justice, it is said dissents — Mr. Justice Todd is not present. The Opinion goes the whole length, & leaves nothing further to be decided. I give my congratulations on this occasion, & assure you that I feel a load removed from my shoulders much heavier than they have been accustomed to bear.

Joseph Hopkinson enclosed Webster's letter to Brown with one of his own, saying with characteristic grace: "I would have an inscription over the door of your building, 'Founded by Eleazar Wheelock, Refounded by Daniel Webster'."

On the side of the University, Dr. Perkins reflected his astonishment to President Allen:

The Opinion of the Court has been given this afternoon most unexpectedly on the cause as argued last term — *and against us!!* I went into court by pure accident, while the opinion was in reading by Judge Marshall — and even our counsel was not there till just the close of the opinion!! They had no intimation that it was to have been delivered without a new argument.

(The variation between Webster's report and that of Perkins as to the presence of Pinkney suggests the latter may have left the courtroom in the course of Marshall's delivery which began in the morning, and then returned at its conclusion in the afternoon.)

The Chief Justice began by asserting that "the single question now to be considered is, Do the acts [of the New Hampshire legislature] . . . violate the constitution of the United States?" He affirmed the court's cautious approach to state enactments and said that "in no doubtful case, would [the court] pronounce a legislative act to be contrary to the constitution." Marshall then reviewed the terms of the 1769 charter and the effect of the New Hampshire legislation upon them.

It can require no argument to prove, that the circumstances of this case constitute a contract. An application is made to the crown for a charter to incorporate a religious and literary institution. In the application it is stated that large contributions have been made for the object which will be conferred on the corporation as soon as it shall be created. The charter is granted and in its faith the property is conveyed. Surely in this transaction every ingredient of a complete and legitimate contract is to be found.

Marshall proceeded to supply answers to the two basic questions: (1) Is the contract one within the protection of the U.S. Constitution; (2) If so, is it impaired by the acts of the New Hampshire legislature? He conceded that

If the act of incorporation [the charter] be a grant of political power, if it create a civil institution to be employed in the administration of the government, or if the funds of the college be public property, or if the State of New Hampshire, as a government, be alone interested in its transactions, the subject is one on which the legislature of the state may act according to its own judgment, unrestrained by any limitation in its power imposed by the constitution of the United States.

But if this be a private eleemosynary institution, endowed with a capacity to take property for objects unconnected with government, whose funds are bestowed by individuals on the faith of the charter; there may be more difficulty in the case. . . . Those who are no longer interested in the property may yet retain such an interest in the preservation of their own arrangements as to have a right to insist that those arrangements shall be held sacred. . . . Or if they have themselves disappeared, it becomes a subject . . . of enquiry whether those whom they have legally empowered to represent them forever may not assert all the rights which they possessed while in being; whether . . . the trustees be not so completely their representatives in the eye of the law as to stand in their place, not only as respects the government of the college but also as respects the maintenance of the college charter.

Marshall then moved to an examination of the charter "to ascertain its true character." He reviewed the recitals in the preamble, including the gathering of funds held in England to further Wheelock's purpose "for the instruction of Indians in the Christian religion," the election of a site on the Connecticut River, "the proprietors in the neighborhood having made large offers of land on conditions that the college should there be placed." He referred to Eleazar Wheelock's application to the crown for "an act of incorporation." It was granted, said Marshall, "in consideration of the premises [the actual words in the charter are: "considering the premises"] for the education and instruction of the youth of the Indian tribes etc. . . . and also of English youth and any others," thereby creating the Trustees of Dartmouth College as "a body corporate with power *for the use of said college*, to acquire real and personal property, and to pay the President, tutors and other officers of the College such salaries as they shall allow." Marshall noted that the charter declared Eleazar Wheelock to be "the founder of said College."

The Chief Justice went on to say that

from this brief review of the most essential parts of the charter, it is apparent, that the funds of the college consisted entirely of private donations. It is perhaps not very important who were the donors. The probability is that the Earl of Dartmouth and other trustees in England were, in fact, the largest contributors. Yet the legal conclusion from the facts recited in the charter would probably be that Dr Wheelock was the founder of the college. . . . But be that as it may, Dartmouth College is really endowed by private individuals . . . for the promotion of piety and learning generally. . . . It is then an eleemosynary, and as far as respects its funds, a private corporation.

The Chief Justice next considered whether "such a contract" was one which "the constitution intended to withdraw from the power of state legislation." He concluded that "the consideration for which they [the original donors and founders] stipulated is the perpetual application of the fund to its object." Though those persons are no longer present "the corporation is the assignee of their rights, stands in their place, distributes their bounty as they would themselves have distributed it had they been immortal."

"It is more than possible," the Chief Justice recognized, "that the preservation of rights of this description was not particularly in the view of the framers of the constitution. . . . [Yet] the case being within the words of the rule must be within its operation likewise, unless there be something in the liberal construction so obviously absurd, or mischievous, or repugnant to the general spirit of the instrument as to justify . . . an exception." He did not find such an exception justified in the case of eleemosynary corporations. "The opinion of the court after mature deliberation, is that this is a contract, the obligation of which cannot be impaired without violating the constitution of the United States. This opinion appears to be equally supported by reason, and by the former decisions of this court."

The question remained whether the New Hampshire acts had in fact impaired the obligation of that contract. After a review of the acts Marshall concluded that under the legislation "the system is totally changed":

> The Charter of 1769 exists no longer. It is reorganized, and reorganized in such a manner as to convert a literary institution, moulded according to the will of its founders, and placed under the control of private literary men, into a machine entirely subservient to the will of government. This may be for the advantage of this college in particular, and may be for the advantage of literature in general; but it is not according to the will of the donors, and is subversive of the contract on the faith of which their property was given.

Thus, on grounds that the New Hampshire acts were "repugnant to the constitution of the United States" Marshall ordered "the judgment of the State Court . . . be reversed."

Justices Washington and Story filed separate concurring opinions, and Justices Johnson and Livingston concurred without written opinions. Justice Duvall dissented and Justice Todd, absent, took no part in the decision. The outcome was an overwhelming 5 to 1 decision in the College's favor. A few days later Justice Livingston, in describing the decision process noted that "each of the Judges, who united in the judgment [reached his own conclusions] without any previous consultation at the last term of the court, or at any time since . . . and the views which were taken on this subject were not essentially different."

Story's opinion, unlike Marshall's intuitive pronouncements, was buttressed with references to a multitude of supporting authorities. Justice Livingston praised it to Story, saying "it affords me more pleasure than can be expressed." The Marshall and Story opinions, in juxtaposition, lend support to the tale that Marshall was wont to declare to Story: "There is the law. Now you must find the authorities."

Report of the College victory did not reach Hanover until February 8, six days after the decision. Greeted with quiet dignity by President Brown and the other officers of the College, the tidings stirred many of the students and other College adherents in the village to pour out their enthusiasm. Rufus Choate, then a member of the Senior Class at the College, wrote to his brother: "When [the news] reached here . . . the bells were rung, cannons fired, bonfires lighted and a thousand other unseemly demonstrations of joy exhibited not to the credit of the rabble that did it or the great men that gave permission. . . ." Judge Niles, senior Trustee of the College who lived a few miles up the Connecticut River from Hanover, reported to President Brown that "a friend . . . informed me that they had heard cannon at Hanover . . . and regarded the firing as announcing that information of a decision in the College cause had arrived." Niles observed, one hopes tongue in cheek, that having concluded "that our friends would not have expressed their joy in this way I instantly saw our cause for lost." In a postscript written on learning the facts, Niles added, "I confess I am mortified by the manner in which it has been *noised about*."

The other Trustee members of the Octagon sent congratulations to President Brown, anticipating a Board meeting to be called, as one of them suggested, "as soon as decency will permit after the funeral obsequies are performed for the decease of our illegitimate sister."

But the "illegitimate sister" had no intentions of expiring, at least not until all possibilities of revival had been exhausted. There was still the pendancy of the Federal Circuit Court cases. The University party at once transferred its hopes to them, as a means of correcting the factual errors which they saw as having determined an erroneous decision by the Supreme Court. They were egged on, in pre-election zeal, by Republican newspapers in New Hampshire.

Dr. Cyrus Perkins voiced the University's dismay by describing Marshall's opinion as misstating "almost every fact" in reliance upon the charter preamble and the arguments of College counsel. "It is most unfortunate for us," he lamented to Allen, "that our cause had not been better prepared at the last term. Even Mr. Hale . . . did not know that the statement . . . that the Indian School was incorporated by the name of Dartmouth College was an incorrect statement. They instructed Mr. Wirt last term to state in answer to Mr. Webster that Lord Dartmouth was the founder of the College!!" At least Perkins was impartial in his accusations against his fellow workers. In letters to Allen he charged, "But for the numbskulls we had for counsel" in New Hampshire, the proper facts would have been established in a special verdict. Mr. P[inkney] is most prodigeously vexed with the management of the cause in N. H. & says if it should be lost it will be lost by the very slovenly manner in which it has been conducted."

Pinkney continued boldly to assert both to his clients and to opposing counsel that he was eager either to reargue the principal case or argue an appeal of one of the Circuit Court cases in the Supreme Court. Webster wrote Mason that "Mr. Pinkney *says* he means to argue one of them; but I think he will alter his mind. There is nothing left to argue on." In Webster's view neither Pinkney nor Wirt had any real desire to prolong the controversy, in view of the broad sweep of the Marshall and Story opinions. They seemed, indeed, to be decisive against the University, even taking as granted the "new facts" which the University sought to have considered.

Shortly after the middle of February it was agreed, in what Webster described to Judge Smith as "a conversation between Bench & Bar," that the Circuit Court cases should be sent back to the Circuit Court in New Hampshire, where the University might move to introduce its "new facts," and from

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Washington Feb: 2. 1819

My Dear Sir

All is safe & certain. The Chief Justice delivered an opinion this morning, in our favour, on all the points. In this opinion Washington, Livingston, Johnson, & Story, Justices are understood to concur, Duvall, Justice, it is said, dissents — Mr Justice Todd is not present. The Opinion goes the whole length, leaves nothing further to be decided — I give you my congratulations, on this occasion; & assure you that I feel a load removed from my own shoulders much heavier than they have been accustomed to bear — Very truly Yr D. Webster

Daniel Webster's letter to President Brown reporting the Supreme Court's decision in favor of the College.

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which an appeal might be taken to the Supreme Court in Washington. In a letter to Jeremiah Mason, Webster predicted that "when the [New Hampshire] election is over, there will be no great inclination to keep up the contest."

By late February judgment in the principal case of *Trustees of Dartmouth College v. Woodward* was formally entered in the Federal Supreme Court in the College's favor, and the New Hampshire Superior Court was directed to carry the judgment into execution. This was a signal for the College authorities to exercise their new legitimacy on the Hanover plain. President Brown requested President Allen to surrender possession of the College buildings long held by the University. Allen declined, whereupon Brown informed him that "the Government of the College, after consulting gentlemen of legal information . . . concluded to occupy the chapel tomorrow morning." The College took similar possession of the tutors' rooms.

On March 1, William Allen issued a notice to "the Students and Friends of Dartmouth University" that, in consequence of these acts, "the officers of instruction in the University are reduced to the necessity of suspending the discharge of the duties, in which by the authority of the State they have been engaged." University instruction ceased soon after. The faculty scattered, as did the University students. Most of the latter transferred to the College, while the remainder entered Union College in New York. But Allen obstinately retained possession of the keys to the Library and a room containing the "philosophical apparatus." He declared to Governor Plumer that "unless you should advise to the contrary" he would continue to deny College access to these quarters. Governor Plumer, vexed that a Federal court had had the temerity to invalidate a New Hampshire statute, advised him to hold the line "until the question was finally settled by the court who have *assumed* jurisdiction." Allen and Hale briefly endeavored to sustain each other's morale by discussing sundry devices for attacking the College and preserving the University. Among them was a plan for new litigation against the College Trustees, based on the naive hope that the New Hampshire courts might elect a course of "opposition and resistance" to the United States Supreme Court. But to all but the most dedicated University supporters it was evident that a denouement had arrived. Choate, in a letter to his brother, observed late in March that "Pres. Allen, as he is fool enough to call himself, is the only University man on the ground."

On April 14 the Trustees of the College gathered for their first meeting since their respectability had been reestablished by the highest court of the land. As usual, President Brown had punctiliously included in the call the Governor of the State, as *ex officio* Trustee of the College. Governor Plumer, with equal formality, stubbornly declined, assigning as his reason that ". . . a difference of opinion exists between us as to the question of right to hold the proposed meeting, and as those who claim the authority to adjudicate on that right have not made a final decision I think it my duty to decline attending your meeting."

Further evidence of the changing order lay in the resignation of John Gilman at the April Trustees meeting. In 1794 Gilman had become an *ex officio* Trustee as Governor of New Hampshire. After his governorship ended he had continued on the Board as an elected member. When he was again Governor of the State from 1813 to 1816 he occupied two of the twelve places on the Board during that period. As noted earlier, Gilman declined to join the Octagon in their break with John Wheelock. This flowed less from a conviction that Wheelock was right than from a feeling that the other Trustees were acting too hastily and disproportionately in removing Wheelock from the presidency. Though Gilman was opposed to the Trustees' course, he was deeply devoted to the College. He resolved not to add to the College's problems by resigning from the Board while the controversy raged; but he attended no meetings after the fateful one in 1815 which dropped John Wheelock. Now that the conflict was about to end, Gilman sent to President Brown his resignation which, he said, "would have taken place some years ago if I had thought it would have been beneficial to the College, or was wished for by the Board, but I had reason to think otherwise."

To fill the vacancy created by Gilman's resignation the Board immediately elected Jeremiah Mason, who later declined despite Daniel Webster's urging. The Board likewise appointed a committee "to demand of the Rev'd William Allen the Library & apparatus belonging to the College." The Board also formally re-adopted the old College seal which had throughout the controversy been in the possession of the University.

After approving a fee of $500 to Joseph Hopkinson "for his services in arguing [the] cause at Washington . . ." the Board took occasion to record their

> highest respect for the zeal, perseverance & distinguished ability displayed by their counsel, the Hon. Jeremiah Smith, Jeremiah Mason, Daniel Webster & Joseph Hopkinson in conducting their cause against the late W^m H. Woodward, and in procuring a decision in the Supreme Court of the United States which gives stability to the immunities of this and all other similar Institutions; — and feeling the inadequacy of any pecuniary acknowledgment they have been able to make, and strong desire to give some more appropriate expression of their gratitude, as well as to gratify the present and future officers & Students, and present and future friends and patrons of the College: request the before named Gentlemen to sit for their Portraits to be executed by Stewart [sic], and placed in an appropriate apartment of the College; that the Treasurer be authorized to pay the expense that may arise in execution of the preceding vote, procure suitable frames for the Portraits, and take charge of them when executed.*

In addition to tidying up after the storm, the Board moved decisively into the future. It rearranged the College calendar, directed that "The President & Professors be a Committee for reviewing the laws of the institution," instructed another committee "to address the Public on the Prospects of the College," and assigned to a third committee a duty "to apply to the Legislature for indemnity or further aid on account of losses & injuries . . . sustained in consequence of late Legislative acts in relation to the College."

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* One must guess at why this objective was not promptly realized, though a lack of College funds to match the warmth of the Trustees' gratitude was perhaps sufficient reason. In any event, it was not until fifteen years later in 1834 that the Board, adverting to the unfulfilled resolution of 1819, called upon Dr. George C. Shattuck to see, on its behalf, that the portraits were executed. Dr. Shattuck was a graduate of the College and its Medical School. He had become a highly successful Boston physician. Within a year after the Trustees request to him the College was the recipient of admirably painted likenesses of the four counsel. Two of them — Daniel Webster and Jeremiah Smith -- were painted by Francis Alexander; the one of Joseph Hopkinson was done by Thomas Sully; while Jeremiah Mason's was the work of Chester Harding — each artist one of the most distinguished of his time. In the end it was Dr. Shattuck who gave the portraits to the College, and so precious College funds were spared after all. These paintings remain in the College's possession. They are reproduced on pages 13 and 18 of this account.

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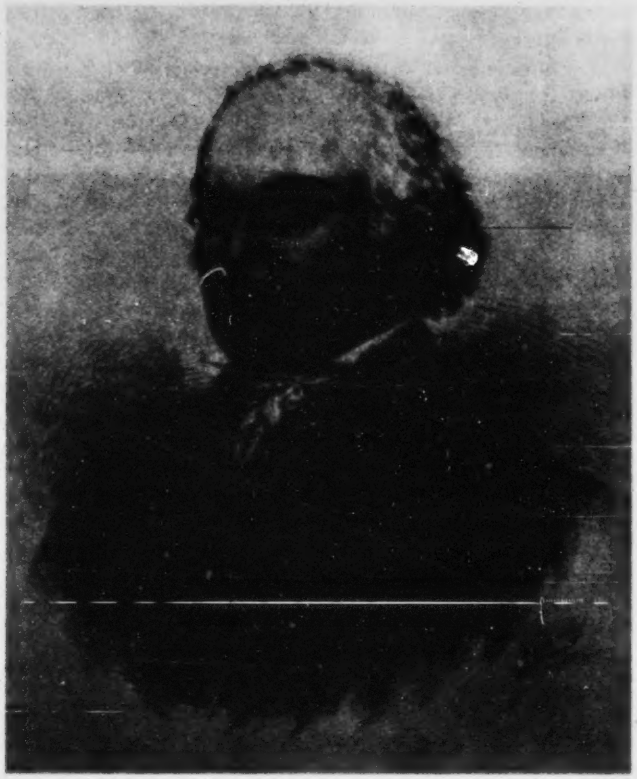

Justice Joseph Story

Meanwhile, College counsel had given formal notice to the University counsel of the College's intention to proceed to final judgment in the Circuit Court cases in the May term. College counsel were determined to avoid, if possible, a continuation of the cases to the fall term. Intent on this objective, Webster reported to Jeremiah Mason an account of a conversation with Justice Story at the latter's home in Salem:

> As to the College Cause, you may depend on it that there will be difficulty in getting delay in that case, without reason. I flatter myself the judge will tell the defendants, that the new facts which they talk of, were presented to the minds of the judges at Washington, and that if all proved, they would not have the least effect on the opinion of any judge; that unless it can be proved that the king did not grant such a charter as the special verdict recites, or that the New Hampshire General Court did not pass such acts as are herein contained, no material alteration of the case can be made.

It is difficult to escape the conclusion that Webster was here paraphrasing Story's actual words.

The May term of the Circuit Court for New Hampshire, Story presiding, opened early in the month at Portsmouth. In addition to Mason, Webster was himself present to represent the College, and he reported the outcome in a letter to Hopkinson on May 9: "The counsel for the University pressed for delay, not being ready with their *new facts*. We opposed, & insisted that it was time to bring the litigation to an end and that they ought to have been prepared; especially as we admonished them formally immediately after my return from Washington that we should press for trial. The Judge saw no reason for delay; but we finally agreed that judgment should be entered . . . on the verdicts as they stand, unless the Defendants should by June 10 show to the judge by affidavit, such new facts, as shall in his opinion, take the case out of the principle settled at Washington."

On May 27, University counsel journeyed to Boston, where Story was then sitting, to offer the "new facts." This appearance Webster described to Mason. Having been presented by University counsel with "a mass of papers," Story thought "there was nothing in them," said Webster, "but has taken the papers for a day or two; to examine them before he gives formal decision. . . . The Judge intimated the *new facts* had no bearing on any part of the Court's opinion." Webster also wrote to assure President Brown: "These new facts whether true or false, have nothing to do with the questions; and you may expect judgment and execution in the causes in the Circuit Court, June 10, as by arrangement made at Portsmouth."

As usual Webster's forecast was accurate. The litigation begun two years before came to an abrupt end, with Justice Story ruling that the new facts, even if conceded, could not change the principle established at Washington. Ten days later William Allen sent to President Brown "all the keys of the buildings which he still held in his possession." Surrender was complete.

PRESIDENT Brown now set about to pick up the pieces. He directed the College's agent for the collecting of rents to reassure the College's tenants, who had understandably withheld their rent payments until they knew to whom they could safely be paid. He began searching for a replacement, on the medical school faculty, for Dr. Perkins whose resignation, not unpredictably, had coincided with the final evaporation of University hopes. He urged Timothy Farrar, the younger, to transfer his law practice from Portsmouth to Hanover to attend to the College's legal business and to perform other services for the College. A hundred other matters pressed upon the President's attention. Evidence from distant places, some trivial, some of the first importance, indicated that there was abroad in the land a renewed confidence in the College's future. Thus Thaddeus Stevens, who had been graduated in 1814, wrote from Gettysburg, Pa., recalling that when he left the Hanover plain he owed the College a small sum. Now that matters had been resolved he was, he said, ready to pay. And Isaiah Thomas, distinguished printer and publisher, sent from Worcester, Mass., a large gift of books to the liberated College. A century and a half later they are among the valued treasures in the College's library.

President Brown took an active interest in drawing up, at the Trustees' direction, a financial claim against the New Hampshire legislature to cover losses and damages to the College resulting from the voided legislation. The University people similarly occupied themselves in preparing a claim against the State to accomplish an orderly receivership. A last meeting of University Trustees assembled to appoint a committee, headed by William Allen, to report to the legislature on "the state of the concerns of the Corporation, and the amount of its debts, dues & claims." The report reminded the legislature that the officers and teachers who worked for the University, "in fulfilling your wishes," had done so "in the faith that the acts [of the legislature] . . . were valid." The report professed "perfect confidence that the Honorable Legislature will provide for the reward of these services."

The College authorities, on the other hand, submitted to the legislature an itemized account totaling nearly $9000 in

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damages and costs, saying they had "a good and valid claim against individuals [meaning Allen and associates] but it would better accord with . . . the honor and dignity of the State that . . . provisions should be made for remuneration" by the legislature.

The two pleas were referred to the same legislative committee. But backbiting in University circles had not ceased, for two University Trustees let it be known that Allen was "too craving" in demanding a salary of $1200 for himself, and openly hoped that "the legislature will not allow him that sum." The legislative committee pared the University request, largely in the Allen salary component, and recommended payment of the balance. There remained, however, the question of how much if anything the legislature would actually appropriate.

In late July one of the displaced University faculty wrote from Albany, New York, to a friend in Hanover that he had "attended Commencement at Union College . . . [where he] saw the Senior Class of *Dartmouth University* take their degrees."

In August the College Trustees came together again, at the first uncontested Dartmouth Commencement in three years. Freed from preoccupations with litigation and concerned once more for the onward daily movement of the College, the Trustees set the course by adopting a wholly new set of "Laws" to govern a restored community of scholars. Webster's brother Ezekiel was elected to fill the vacancy on the Board which Jeremiah Mason had declined, and Daniel himself was in Hanover for the Commencement exercises, to receive in person the outpourings of gratitude. Among the twenty-five voted Bachelor of Arts degrees was Rufus Choate, whose undergraduate career had spanned the controversy. Chancellor Kent was awarded, in absentia, an honorary LL.D. The Trustees likewise voted to buy from President Brown his recently acquired residence overlooking the College green on the west side (later known as the Sanborn house), and to allow him the use of the house in addition to his salary. With the knowledge that President Brown's health was in serious decline, the Trustees resolved that during an absence or disability on his part "the senior Professors" were to "perform all the public duties pertaining to the Office of President of the College."

THE four years of upheaval had produced casualties. With the arrival of peace, the victims from both College and University were revealed as men for whom each side could feel some measure of sympathy and regret. The first of them was President John Wheelock who had died early in the battle, but probably not early enough to have escaped forebodings of the destruction of his hopes. Occurring in April 1817, when the University fortunes were at their apogee, his death, however, spared him personal participation in the collapse of his dreams and any suspicion of the low esteem in which he would be held by succeeding generations in the Dartmouth College family. Then came William H. Woodward, nephew of John Wheelock, whose loyalty to his uncle placed him first among the targets at which the College Trustees directed their attack. Dying when the University forces were still full of hope, Woodward also must have had intimations of the coming defeat. Though himself no schemer, and far less an instigator than John Wheelock, Woodward had been caught up in an ambience where his name, almost as much as John Wheelock's, became the conspicuous symbol of an evil day in the College's history.

There were lesser actors in the long scene who also found themselves victims of events. Dr. Cyrus Perkins, graduate of the Dartmouth Medical School and distinguished teacher there since 1810, had chosen to align himself with the University, moved probably by the loyalties of his wife, a daughter of Professor John Smith, John Wheelock's most devoted supporter in church and faculty. When the decision went against the University, Perkins knew that there was no longer a place for him in Hanover. Regretfully he sold his home, and took up the practice of medicine in New York. The three teachers at the University (Carter, Dean, and Searle) lost their employment in mid-term, and departed Hanover with little to their names except claims against the legislature for unpaid back salary, only one of which was ever honored, and then only in part. The Rev. William Allen, whose position as President was extinguished with the University, also faced the prospect of redirecting his career. He arouses perhaps less sympathy for his predicament, for unlike Perkins, he was one to whom the Hanover institution had only recently had an appeal. Moreover, his resourcefulness assured a deft landing on his feet no matter which direction he jumped. In the summer of 1819, Allen was offered the pastorship of the Congregational Church in Princeton, N. J. But he had a grander design, and when later in the year Bowdoin College tendered him its presidency he accepted. Many thought it a promotion, mindful of the state of Dartmouth's finances and the long road ahead to restoration.

The College had suffered no casualties during the heat of the battle, but now that the contest had been won, the gallant Francis Brown was to be lost to the College in whose rescue his role had been so decisive. Immediately after the College's first Commencement in its new day of freedom, President Brown, ill with what had been diagnosed as pulmonary tuberculosis, set out with his wife, Elizabeth, on a trip to northern New York State, in an attempt to stay the progress of his ailment. How financially bereft he was is suggested in a letter to Thomas Thompson in which he said he had expected "to have a little spare money of my own to use on the journey, but as usual my merchant bills exceed expectations, and it is necessary for me to part with nearly all the money I have." Concluding that the one hundred dollars from the College might not be enough for the journey he said he would "be glad to receive" an additional fifty from the College Treasurer. From Saratoga Springs a few days later the President reported courageously to Charles Marsh his "perhaps improving symptoms."

But the journey failed to provide the relief expected, and when President Brown returned to Hanover in September he was so weakened as to be unable to attend regularly to his duties. Unfortunately, the belief prevailed that a palliative might be found in still another journey, particularly as it would remove the President from the severity of a Hanover winter. Consequently, on October 11, 1819, President and Mrs. Brown, with their chaise and horses, started southward down the Connecticut River valley, then a thoroughfare of autumn crimson and gold. They left behind them their children in the care of a woman secured for the purpose. A purse privately assembled among friends of the President supplemented the Brown family's slender means for the journey. Stopping along the way with their many acquaintances and church colleagues, the pair moved at a leisurely pace. At the end of the month Dr. Nathan Smith wrote from New Haven to Mills Olcott: "President Brown passed this way . . . but I was absent and did not see him. . . . From the

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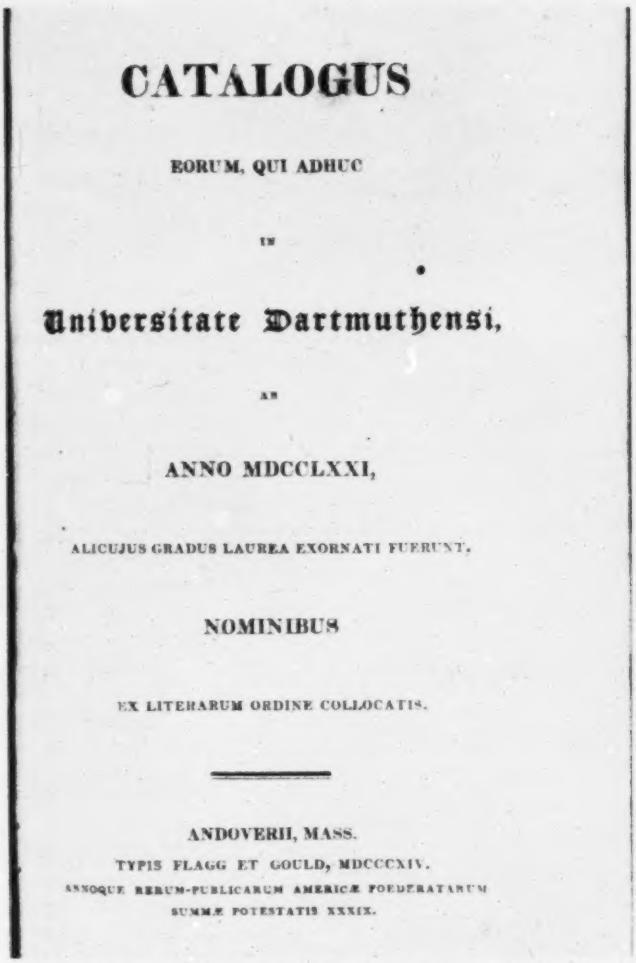


CATALOGUS

EORUM, QUI ADHUC

IN

Universitate Dartmuthensi,

AN

ANNO MDCCLXXI,

ALICUJUS GRADUS LAUREA EXORNATI FUERUNT.

NOMINIBUS

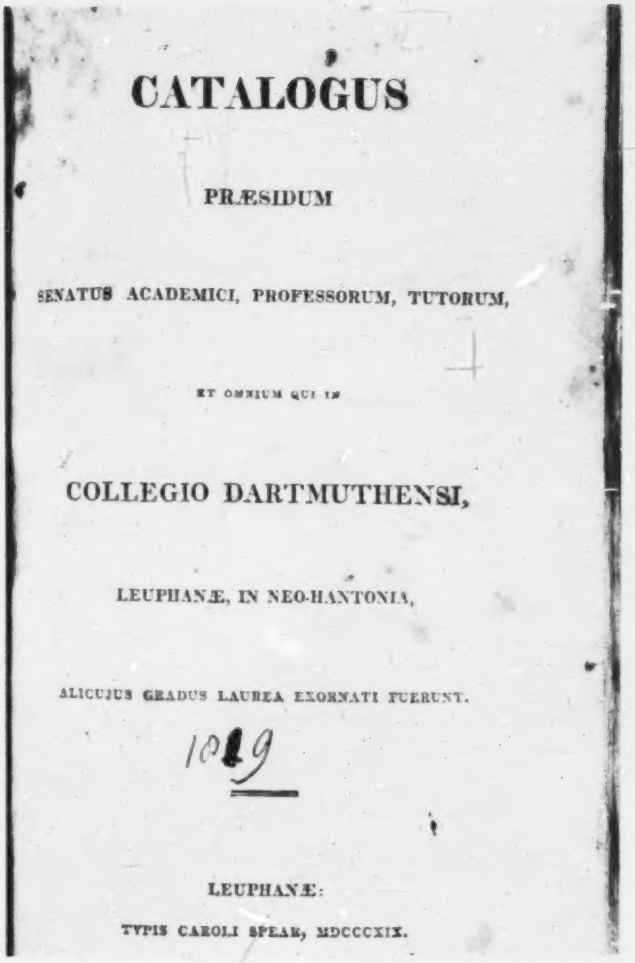
EX LITERARUM ORDINE COLLOCATIS.

ANDOVERII, MASS.

TYPIS FLAGG ET GOULD, MDCCCXIV.

ANNOQUE REBUM-PUBLICARUM AMERICÆ FOEDERATARUM

SUMMÆ POTESTATIS XXXIX.



CATALOGUS

PRÆSIDUM

SENATUS ACADEMICI, PROFESSORUM, TUTORUM,

ET OMNIUM QUI IN

COLLEGIO DARTMUTHENSI,

LEUPHANÆ, IN NEO-HANTONIA,

ALICUJUS GRADUS LAUREA EXORNATI FUERUNT.

1819

LEUPHANÆ:

TYPIS CAROLI SPEAR, MDCCCXIX.

Before the Dartmouth College Case, the college catalogues almost always used the word "University" (as in 1814, left). After the controversy and the Supreme Court's decision, the 1819 catalogue significantly appeared with "College" which has been used ever since.

account given me by those who saw him I am apprehensive that there must have been some insanity on the part of his friends at Hanover or they would not have suffered him to have set out on such forlorn hope."

Elizabeth Brown kept a diary of their journey. Her pathetic account shows that her husband's health was a problem throughout, with good days more and more outbalanced by the bad. Their way took them through Philadelphia, Baltimore, Washington, and Richmond. In early December they reached North Carolina, whence they moved on to Charleston, South Carolina, in time for Christmas. Beginning in December Mrs. Brown kept a separate journal, presumably removed from her husband's eyes, in which she recorded her alarm at the President's health, and inscribed her prayers: "... cut him not off in the midst of his days, in the midst of his usefulness." In the secrecy of these pages she noted both her own and her husband's fears that he would not live to return to Hanover.

By February 1820 they had reached Georgia ("plum and peach trees in bloom"). From Savannah they turned back homeward in April. In May, again enroute through North Carolina, Elizabeth Brown wrote: "The country and farms we passed for a day or two seem more like dear New England than anything I have seen before at the south." And of their lodging that night she noted that "Chief Justice Marshall put up at the same house." Thus passed on the road two figures who, in their separate ways, had been central to the preservation of the College at one of the most critical times in its history.

In early June the Browns started back up the Connecticut valley, arriving in Hanover on June 22. "[We] found our dear children and friends well.... May we have hearts to praise the Lord for all his goodness to us on this very long journey," noted Elizabeth in a closing entry in her journal. The next month, July of 1819, the President died at the age of 36.

It is tempting to reflect on what different route the College might have been led had President Brown not been lost to it "in the midst of his usefulness." His qualities of leadership, his perseverance, his strength of purpose, his personal charm and capacity to command eager response and, indeed, devotion from his students, had all been amply demonstrated in the four years of his presidency. Notable, too, was his ability to translate into dollars for the institution the confidence which he inspired in the eyes of alumni and friends of the College. The immense respect and affection in which he was held by a vigorous Board of Trustees was also a powerful basis for accomplishment.

There can be no doubt that the College was sorely in need of strong leadership. The years ahead called first for

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recovery of the ground lost during the controversy. An atmosphere troubled by bitterness and strife had had its effect on the number and kind of students enrolled. In 1814, the year before the contest between President Wheelock and the Trustees broke into the open, the College graduated thirty-three seniors of whom exactly one-third came from Massachusetts, and the balance, in a three to two ratio, from New Hampshire and Vermont. But in 1820 the graduating class numbered twenty-five, with New Hampshire accounting for more than one-half the total and with only one-sixth drawn from outside New Hampshire and Vermont. Vigorous and experienced guidance was requisite at this juncture to build the College into a strong institution, capable of sustaining competent teachers and the physical resources essential to a quality education, so that students might be drawn from beyond parochial limits. Francis Brown eminently possessed those qualities needed to hasten the College toward its destiny. His loss was a calamity which measurably delayed a realization of the institution's potential.

As indicated at the outset this account has been primarily concerned with a lay view of the Dartmouth College Case, and even more particularly with a College family view of it. Although there is no intention to expand an essentially insular treatment into a comprehensive study, it is appropriate, before bringing this to an end, to identify some essentially professional points of view regarding the effect of the decision upon the larger society.

For the College and its constituents the full impact of the Supreme Court decision was of course immediate and conclusive. But almost as quickly came a recognition on the part of bar and bench that the Marshall opinion had pushed notably further the Constitution's protection of private rights against state encroachment. In his *Life of John Marshall,* Albert J. Beveridge suggests that Marshall's long-held economic and political convictions led him irresistibly to regard contracts as sacred, the stability of institutions as essential, and the preeminence of national authority as indispensable. With an awareness of the Chief Justice's predilections, and a familiarity with his earlier decision holding states to promises on grounds of contract, "Nobody," says Beveridge, "should have expected from John Marshall any other action than he took in the Dartmouth College Case."

The only specific questions which the Supreme Court had before it were whether the Dartmouth charter was a contract of the sort protected by the Constitution, and if so whether the State of New Hampshire had impaired the obligation of that contract. An affirmative answer on both these counts, involving as it did a finding that Dartmouth College was a private eleemosynary corporation, produced a doctrine which it could be assumed would extend at least to any other private eleemosynary corporation in a similar situation. But it remained to be determined how much farther the doctrine would be allowed to reach. It quickly became clear that the Court intended to apply the same rule to private business corporations, but only the prescience of a Justice Story could have foreseen the true sweep of the decision's effect.

Story, in a letter to Chancellor Kent written six months after the decision, referred to "the vital importance to the well-being of society, and the security of private rights, of the principles on which the decision rested." He continued, "Unless I am very much mistaken, these principles will be found to apply with an extensive reach to all the great concerns of the people and will check any undue encroachments on civil rights which the passions or the popular doctrines of the day may stimulate our State Legislatures to adopt."

That Story's views came to be shared by Kent was evident in 1840 on the appearance of Kent's famous *Commentaries on American Law.* In that work the Chancellor referred to "this celebrated case," calling it "one of the most full and elaborate expositions of the constitutional sanctity of contracts." Kent concluded that "the decision . . . did more than any other act, proceeding from the authority of the United States, to throw an impregnable barrier around all rights and franchises derived from the grant of government; and to give solidity and inviolability to the literary, charitable, religious, and commercial institutions."

Charles Warren pointed out in *The Supreme Court in United States History* (1920) that up to 1800 there had been only 213 corporations of all kinds chartered in the United States, of which only eight were manufacturing corporations. Warren placed the beginning of the growth of the business corporation in 1815, with the close of the War of 1812. "Unquestionably," he wrote, "the decision [in the Dartmouth College Case] came at a peculiarly opportune period; for business corporations were for the first time becoming a factor in the commerce of the country, and railroad and insurance corporations were, within the next fifteen years, about to become a prominent field for capital." The freedom from capricious interference by state legislatures, which the decision assured, provided a stability for corporate activities that increased enormously the use of the corporate device. From this flowed, however, not only great benefits to the economy of the nation but social evils of the first order as well. Impregnable behind the bastion erected by the Dartmouth College Case, each business corporation so inclined was in large measure free to conduct itself solely in its own selfish interests.

For as long as the Case had been seen as merely throwing a protective shield around private educational institutions, few persons, other than doctrinaire Democrats on the Jeffersonian model, were disposed to view it as unsatisfactory. But once that protection appeared to extend equally to business corporations engaged in outrageously anti-social activities, legislators, lawyers and judges alike began looking for ways to limit the Case's capacity for harm. Except from within the sanctuary of the law journals, little attempt has been made to mount a frontal attack against the decision, on grounds that it was in error in assimilating corporate charters to contracts. But other means have been at hand to keep under control its unwanted by-products. The first of these lay in the unchallenged power of state legislatures, in connection with the original issuance of charters, to place restrictions upon corporate freedom. In the exercise of this power, as Justice Story pointed out in his opinion in the Dartmouth College Case, the legislature might reserve a right to alter, or even revoke the charter of a corporation. It is interesting to note that the Massachusetts legislature was not unmindful in the 1790s of the opportunity to retain a means of control over charitable corporations. R. N. Denham, writing on the Dartmouth College Case in the January 1909 issue of *Michigan Law Review,* pointed out that the Massachusetts legislature reserved a right to make certain alterations in the government of Harvard, Williams, and Bowdoin. But many states, even with the knowledge of the consequences of inaction, were slow in tailoring their incorporating machinery to preserve routinely this power over new corporations. Professor Gerald Gunther of the Stanford University Law School in a note on the contract clause in his *Cases and Materials*

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on Constitutional Law (1965), observes that "the relatively protected position of corporations later in the Nineteenth Century . . . was due less to any shield supplied by the Court than it was to the legislatures' own unwillingness to impose restraints."

A SECOND type of limitation on the consequences of the decision was successfully urged upon the Supreme Court under Marshall's successor, Chief Justice Taney, whose social outlook differed sharply from his immediate predecessor's. It was the doctrine that the contract created by a corporate charter must be strictly construed as conferring no more rights than were expressly stated. This restraining principle was found acceptable in *Charles River Bridge v. Warren Bridge*, decided in 1837, Justice Story dissenting. In that case Daniel Webster was on the losing side.

Yet a third type of restraint upon the sweeping language of Chief Justice Marshall arose in the Supreme Court's practice, at least as early as the 1870s, of upholding some modifications of corporate rights by a state legislature through the exercise of "police power," a power to act for the protection of the public. And still another limitation, recognized at a very early date, was the exercise of the states' overriding powers of "eminent domain," resting philosophically on much the same basis as the "police power."

The atmosphere of controversy around the decision in the Dartmouth College Case grew more heated beginning in the 1870s, when large corporate enterprise was often under scrutiny because of nefarious practices of certain operators. In an article published in the *United States Law Review* in 1874, C. H. Hill assumed that Chief Justice Marshall was led to his decision not by legal principles but by "the seeming hardship of the case, and by a feeling that public policy demanded it." Hill claimed a power for state legislatures to do precisely what the New Hampshire legislature did, and declared that such a power was not limited to charitable corporations but "applies *a fortiori* to great mercantile corporations like railways. Indeed, had the decision in the Dartmouth College Case extended no further than to the charters of eleemosynary institutions, we should not have taken the trouble to review it. . . . But when we come to huge monopolies like railways, the necessity of some power of supervision becomes apparent. . . . The control they require is legislative . . . not judicial." Hill seems to have believed that all exercise of "police power" was precluded by the opinion. He volunteered the view that Dartmouth College "as Dartmouth University . . . would have enjoyed equal prosperity and that the dangers to which her eloquent son thought her exposed were to a great extent fictitious and imaginary." Hill concluded that "if the decision cannot be controlled and limited without completely overruling it, a declaratory amendment to the Constitution" should be sought rather than a judicial reversal.

John M. Shirley, lawyer and a New Hampshireman by origin, published in 1879 an ill-arranged work of nearly 500 pages entitled *The Dartmouth College Causes*. He vigorously disagreed with the arguments of counsel on behalf of the College and with the opinions in the Supreme Court. He supported wholeheartedly the University position and Chief Justice Richardson's opinion in the New Hampshire Superior Court. A tendency to ascribe improper motives and conspiratorial conniving to College counsel and other supporters betrays a bias that greatly weakens Shirley's reasoning.

In 1886 William P. Wells, University of Michigan law professor, read a paper entitled *The Dartmouth College Case and Private Corporations* at the annual meeting of the American Bar Association. He pointed out the early acclaim accorded the decision, and the later deterioration in esteem for it, quoting as an illustration of the change Justice Cooley's comment in the 1870s that "It is under the protection of the decision in the Dartmouth College case that the most enormous and threatening powers in our country have been created, some of the great and wealthy corporations having greater influence in the country at large and upon the legislation of the country than the states to which they owe their corporate existence." Professor Wells reviewed both the beneficial and the evil results, and concluded that the courts were controlling the harmful effects without the abandonment of good features that a specific reversal would involve. The control he identified was the tendency of the courts to hold in check the doctrine of the Dartmouth College Case in those situations in which the public interest was adversely affected.

A thoughtful retrospective glance at the Case was recorded in 1892 by Charles Doe, graduate of Dartmouth College in 1849 and Chief Justice of the New Hampshire Superior Court from 1870 until his death in 1894. Judge Doe, writing in the *Harvard Law Review*, concluded that the 1817 New Hampshire Superior Court decision of his predecessor, Chief Justice Richardson, had been in error. Doe's view was that though the State had power to revoke the charter, it lacked power to take control of the corporate property, and that the State's attempt to direct the management of the College's property was in violation of the Constitution of the State of New Hampshire. Chief Justice Doe further concluded that the decision in the United States Supreme Court was also in error in holding that the College's charter was a contract within the meaning of the proscription in the Federal Constitution.

IN 1901 the Centennial of John Marshall's appointment as Chief Justice of the United States was celebrated in many states. At the New Hampshire celebration the speaker was Jeremiah Smith, son by a late marriage of the Jeremiah Smith who had been College counsel in the Dartmouth College Case and one-time Chief Justice of the New Hampshire Superior Court. Jeremiah Smith, the younger, who was himself a distinguished practitioner and teacher of law at Harvard, observed, "Of all Marshall's decisions the one most frequently doubted in this State is that in the Dartmouth College Case. No lawyer likes to be compelled to choose between the conflicting views of two such jurists as Richardson and Marshall. It seems presumptuous to differ from either; still more to differ from both. And yet I, for one, am inclined to say that *both* these great judges were wrong; . . . that Richardson erred when he held that the amendatory statutes were *not* in violation of the Constitution of New Hampshire; and that Marshall erred when he held that the statutes *were* in violation of the Constitution of the United States. . . . I incline to endorse the views on this subject expressed by Judge Doe."

Professor Smith pointed out that the case was decided in the United States Supreme Court solely under the contract clause, and "long before the adoption of the Fourteenth Amendment" to the Federal Constitution, which proscribed states from depriving persons of property "without due process of law." He noted that "the reasoning of both Mr. Mason [before the New Hampshire Superior Court] and Judge Doe

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[in his article] clearly demonstrates that the New Hampshire Statutes of 1816, if enacted today, would be in violation of that amendment. . . . The reasoning in Marshall's opinion tends irresistibly to the same conclusion. . . . His error, if error there was, is in the assertion that the grant of a corporate charter involves a contract on the part of a state, within the meaning of . . . the United States Constitution." (Professor Smith, in view of the occasion on which he was making his remarks, felt it necessary to add: "That Marshall made occasional mistakes may be safely admitted without seriously detracting from his judicial reputation.")

Professor Paul A. Freund of the Harvard Law School in his recent work *On Law and Justice* noted that "where Marshall heard only a single voice emanating from the contract clause, his successors have attuned themselves to stereophonic sound." Freund describes Chief Justice Marshall's doctrines in some cases as "going beyond the necessities of the . . . problem, doctrines which plagued constitutional law for a long time, because they could not contain the counter pressures from state interests that had been slighted in the formula." He concludes that "the general direction of Marshall was characteristically wise, but the momentum of doctrine shot beyond the mark, and other generations were obliged to retrace some giant steps in order to follow a viable course."

An inclination to assign to the Dartmouth College Case a central and heroic role in nineteenth-century laissez faire industrial development in America should be tempered by less exuberant estimates identifying the Case as but one of many shaping influences, most of which were more irresistible in their suasion. Benign in the cradle period of the nation's industrial might, the Case's later status as handmaiden to evil was of relatively short duration, as a result of the corrective restraints already mentioned. Accordingly, no present-day member of the Dartmouth College family need feel weighed down by a vision of the College's freedom bought at the price of public suffering from endless corporate chicaneries. Conversely it is well to keep in mind that it was the College, not the world, that was saved on that second day of February 1819 when Chief Justice John Marshall read his opinion in the Dartmouth College Case.

One sometimes hears it said today in lawyers' shop-talk that "the Dartmouth College Case is no longer good law." This is a manner of speaking. It is true that Marshall's words have been leashed, but it is also true that the doctrine of the Case has never been expressly repudiated by the United States Supreme Court, as was, for example, the principle of "separate but equal." Nor is the Case ever likely to receive that kind of negative distinction. Admittedly, however, the passage of time has rendered it a somewhat elderly dragon, diminished in both stature and energy. It retains a capacity to emit smoke and fire, should an assault be made again on an ancient college charter encasing the aspirations of a founder and donors long dead. But even in its original preserve it is subject to being immobilized on a command to "charge!" in the name of public policy or a rival constitutional exigency. Thus, seen from beyond the Hanover Plain, *Trustees of Dartmouth College v. Woodward* is perhaps now but a small Case, and yet . . .

About the Author:

IN WRITING HIS ACCOUNT of the Dartmouth College Case, Richard W. Morin had the advantage of the legal training and practice which preceded his joining Dartmouth's administrative staff, first as Executive Officer of the College and then, for 18 years, as Librarian. Following graduation from Dartmouth in 1924 he took his law degree at Harvard and also studied at Oxford University and *École des Sciences Politiques* in Paris. He served as U. S. Vice Consul in Paris (1929-33) and then with the U. S. Department of State in Washington for two years before returning to his native city of Albert Lea, Minn., to practice law. Again in Washington in 1942, he helped organize the State Department's Offices of Public Information and Public Affairs, and was deputy director of the latter. Three more years of law practice in Albert Lea preceded his return to Dartmouth in 1948. He retired last year and now is Librarian of the College, *Emeritus*.

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RWM
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